IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Ford Motor Company, Chicago Stamping Plant (Company), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 18, 1978, enforcing an order of the National Labor Relations Board against the Company.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A17) is reported at 571 F. 2d 993 (1978). The Decision and Order of the National Labor Relations Board (Appendix B, *infra*, pp. A18-A45) is reported at 230 NLRB No. 101 (1977).

JURISDICTION

The decision of the Court below issued on February 22, 1978. On March 23, 1978, the Court denied the Company's Petition for Rehearing En Banc (Appendix C, *infra*, p. A46). The April 18, 1978, judgment of the Court below is reproduced as Appendix D, *infra*, pp, A47-A48. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The basic question is whether in-plant cafeteria and vending machine food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act, as amended, and therefore mandatory subjects of collective bargaining.

A subsidiary question is whether in-plant food services are also "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 *et seq.*), are set forth in Appendix E, *infra*, p. A49.

STATEMENT OF THE CASE

In this case a panel of the Court of Appeals enforced a Decision and Order of the National Labor Relations Board in which the Board, *inter alia*, found that the Company had unlawfully refused to bargain with Local 588, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Union), concerning in-plant cafeteria and vending machine food prices and services, and ordered the Company to bargain with the Union concerning food services and changes in food prices (App. A, p. A17; App. B, pp. A26-A27).

A—The Facts

The Company operates an automotive parts stamping plant in Chicago Heights, Illinois (App. A, p. A2). Hourly rated production and maintenance employees are represented by the Union (App. A, p. A2).

The Company provides its employees two air conditioned cafeterias and five air conditioned food vending areas (App. A, p. A2). Since 1970, an independent food caterer, ARA Services (ARA), has serviced these areas, providing food and vending machines (App. A, p. A2; App. B, p. A32).

The agreement between the Company and ARA, subject to termination by either party on 60 days' notice, provides that the Company will reimburse ARA for its direct costs of the food and vending operations plus a 9% surcharge for administrative costs and service fees (App. A, p. A3). If receipts exceed this amount, the excess will be returned to the Company (App. B, p. A20). If receipts are less than costs plus the surcharge, the Company is obligated to subsidize ARA up to an annual amount not to exceed $52,000 (App. A, p. A3). In recent years the operations have been on a loss basis and the Company has made up annual losses to ARA (App. A, p. A3).

All employees are provided a 30-minute lunch period and two 22-minute rest periods daily (App. B, p. A20). Although they may do so, very few employees leave the plant during their lunch breaks (App. B, p. A20). They are not entitled to leave during the 22-minute breaks (App. B, p. A20).

Employees may bring their own food into the plant and store it in their personal lockers (App. A, p. A2). A Union witness testified that the lockers are not air conditioned and, during the summer, become hot (App. A, p. A2; App. B, p. A35). This witness also testified that employees have complained about spoilage of food stored in their lockers (App. A, p. A2; App. B, p. A35).

The present controversy developed when the Company was informed by ARA that, effective February 9, 1976, it would increase the prices of certain food items sold in the cafeteria and vending areas by either 5 or 10¢ (App. A, p. A5). The Company advised the Union of ARA's plans and refused the Union's request to bargain about the increases prior to ARA's implementing them and subsequently refused to bargain with the Union about food prices and services (App. A, p. A5).

On February 16, 1976, the Union began a boycott of the food service operations in which over half the employees participated. This boycott continued until June 7, 1976, and did not result in a reduction of food prices (App. A, p. A5).

From time to time prior to the February, 1976, price increases, the Company had bargained with the Union concerning various aspects of the food services provided its employees—for example, agreeing that there would be adequate personnel to serve food in the cafeterias, that a facility would be located in a new addition and that broken vending machines would be promptly repaired (App. A, p. A4). At no time, however, did the Company bargain with the Union regarding the prices of food sold in the cafeterias or vending areas (App. A, p. A5).

B—The Board's Decision and Order

The Board, reversing its Administrative Law Judge, found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the price increases and about the in-plant food services, and by refusing the Union's request for information about food services at the plant (App. B, pp. A23-A25). The Board held that this conclusion was mandated by its rulings in four prior cases that "in-plant food prices are a mandatory subject of bargaining", notwithstanding that each of the decisions was denied enforcement by a Court of Appeals (App. B, p. A22).[1] The Board rejected the reasoning of the Administrative Law Judge that these Courts of Appeals decisions, coupled with the Board's failure to seek certiorari in the most recent of them, indicated that the Board had accepted the judicial view that in-plant food prices were mandatory subjects of bargaining (App. B, pp. A23-A24). The Board stated that regardless of the reversal of its earlier decisions by the Courts of Appeals, "we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining" (App. B, p. A23). The Board, *inter alia*, ordered the Company to bargain with the Union with respect to food services and any changes, "now in effect or hereafter made or proposed," in food prices charged employees (App. B, p. A27).

C—The Decision of the Court of Appeals

Quoting at length from this Court's opinion in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), and particularly from Mr. Justice Stewart's concurring opinion, the Court of Appeals held that in-plant cafeteria and vending

1. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), *enf. denied*, 387 F. 2d 542 (4th Cir. 1967); *McCall Corp.*, 172 NLRB 540 (1968), *enf. denied*, 432 F. 2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268 (1971), *enf. denied*, 457 F. 2d 936 (1st Cir. 1972); *Ladish Co.*, 219 NLRB 354 (1975), *enf. denied*, 538 F. 2d 1267 (7th Cir. 1976).

machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and are therefore mandatory subjects of bargaining (App. A, pp. A8-A10).[2] The Court of Appeals viewed the issue of whether in-plant cafeteria and vending machine food prices and services are terms and conditions of employment within the meaning of Section 8(d) of the National Labor Relations Act as a question to be resolved upon an evaluation of the relevant facts of each case (App. A, pp. A8-A12). On this basis the Court of Appeals factually distinguished this case from an earlier decision by a different panel of the same Court, *NLRB* v. *Ladish Co.*, 538 F. 2d 1267 (1976), and from decisions by the First and Fourth Circuits,[3] all holding that the matter of in-plant cafeteria and vending machine prices is not a mandatory bargaining subject (App. A, pp. A11-A17).

According to the Court of Appeals, these factual distinctions were: the Company retained control over cafeteria and vending machine prices; the Company might make a profit from the food service operation; since 1967 the Company and the Union had bargained over in-plant food services; bringing their own lunches was not a viable alternative for employees; over half of the Company's employees had boycotted the food service operations; and employees were represented by a single union (App. A, pp. A16-A17).

2. Although both the Board and the Court of Appeals found that the Company violated the Act by refusing to bargain with respect to food prices and services, the basic dispute between the parties concerned only the February, 1976, increase in food prices. Services were only incidentally mentioned in an exchange of correspondence concerning prices. At no time did the Union indicate any aspect of services as to which it desired to bargain.

3. See cases cited *supra* n. 1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Decisions of the First and Fourth Circuits and with an Earlier Decision of the Seventh Circuit

By virtue of the decision below, there now is a conflict in Courts of Appeals on whether in-plant food prices are mandatory subjects of collective bargaining. The decision below conflicts with decisions of the Courts of Appeals for the First and Fourth Circuits, which reached the opposite conclusion. In *Westinghouse Electric Corp.* v. *NLRB*, 387 F. 2d 542 (1967), the Fourth Circuit, sitting *en banc*, overruled the earlier panel decision and held that Section 8(d), as interpreted by this Court in *Fibreboard Paper Products Corp., supra*, did not require the employer to bargain about price increases implemented by an independent contractor which operated cafeterias in the employer's facility. Subsequently, in *McCall Corp.* v. *NLRB*, 432 F. 2d 187 (1970), a panel of the Fourth Circuit held that in-plant cafeteria and vending machine prices were not mandatory bargaining subjects under the earlier *Westinghouse* decision and rejected the argument that a different result should be reached because the employer and not an independent contractor set food prices. The First Circuit in *NLRB* v. *Package Machinery Corp.*, 457 F. 2d 936 (1972), held that cafeteria and vending machine prices charged by an independent contractor, which the employer subsidized, were not mandatory subjects of bargaining.

Moreover, the decision below conflicts with the Seventh Circuit's earlier decision in *NLRB* v. *Ladish Co., supra*. In that case, the Court held that the employer was not required to bargain about food prices charged in vending machines owned and maintained by an outside contractor.

Accordingly, certiorari should be granted to resolve this conflict between the Circuits and between different panels of the Seventh Circuit. The assertions of the Court below that this

case is distinguishable from other decided cases dealing with in-plant food prices simply do not withstand analysis.

First, both the Board and the Administrative Law Judge recognized that this case presents the same issue which was raised in the decisions of the First and Fourth Circuits and in the earlier Seventh Circuit decision. As the Board stated: "The Administrative Law Judge correctly found . . . that the present case falls within the factual and legal context of the Board's decisions in *Westinghouse Electric Corporation, McCall Corporation, Package Machinery Company,* and *Ladish*" (App. B, p. A22; footnotes omitted).[4] However, the Board did not deem itself bound to follow these decisions and criticized the Administrative Law Judge for following them rather than following the Board's prior rulings.

Second, and fully as important, the "distinctions" focused on by the Court are not material or are without legal significance.

A. *Influence over Prices.* Although the Court below sought to find that the Company controlled food prices and services by virtue of its right to review prices and the "leverage" afforded by the subsidy agreement, much greater employer control was involved in *McCall Corp.* v. *NLRB, supra,* where the employer in fact established food prices and supplied the food. Likewise, in both *Westinghouse Electric Corp.* v. *NLRB, supra,* and *NLRB* v. *Package Machinery Co., supra,* the employers subsidized food operations by providing rent-free space and equipment or cash.

B. *Possibility of Profit.* Although the Court below suggested that this case was different from the other decided cases because of the possibility of profit by the Company, such a possibility was, obviously, present in *McCall Corp.* v. *NLRB, supra,*

4. The Administrative Law Judge stated:

"It is unnecessary, in my opinion, to have discussed [*Westinghouse, McCall, Package Machinery* and *Ladish*] in greater detail for it is beyond question that in-plant food prices are a mandatory subject of bargaining on the basis of the . . . Board decisions. It seems equally clear that such prices are not a required subject of bargaining if the . . . court decisions be controlling. The present case is therefore not one that requires in-depth analyses of the cases and underlying theory" (App. B, p. A43).

where the employer controlled the entire food operation. In any event, the mere possibility that unprofitable operations might become profitable should not be significant.

C. *Prior Bargaining.* The reliance placed by the Court below on prior bargaining between the parties over certain aspects of the food service operation simply ignores this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U. S. 157, 187 (1971), that "[b]y once bargaining and agreeing on a permissive subject, the parties . . . do not make the subject a mandatory topic of future bargaining." Thus, the Company's prior bargaining with the Union about certain aspects of the in-plant food service cannot, as a matter of law, serve to distinguish this case from the other cited decisions.

D. *Lack of Viable Alternative.* As in *Westinghouse Electric Corp.* v. *NLRB, supra,* and *NLRB* v. *Ladish Co., supra,* the Company's employees had, and many utilized, the alternative of bringing food into the plant rather than purchasing it from the cafeteria or vending machines. For example, during the boycott, most employees brought their lunches (App. B, p. A40).

E. *Boycott.* The mere fact that certain employees were disturbed enough by the price increase to boycott the food services cannot convert those prices into subjects of mandatory bargaining. As this Court held in *Pittsburgh Plate Glass, supra,* and in *Fibreboard Paper Products Corp., supra,* the Act establishes a limited list of mandatory bargaining subjects. That list cannot be expanded simply because certain employees are interested enough to undertake some form of economic action or, for that matter, file an unfair labor practice charge.

F. *Number of Unions Involved.* That the Company would be obligated to bargain with only one union on food prices, a fact on which the Court below placed some reliance, cannot expand the scope of the Act's mandatory bargaining requirements. Obviously, the statutory obligation to bargain does not depend on the number of unions involved.

In sum, the efforts of the Court below to distinguish this case from the decisions of the First and Fourth Circuits and its earlier decision in *NLRB* v. *Ladish Co., supra,* are unavailing. This case presents the same issue as was considered in those cases and reaches the opposite conclusion.

II. This Case Presents Questions of Substantial and Recurring Importance in Collective Bargaining and Therefore Is Appropriate for Decision by This Court

The novel and difficult character of the issues presented in this case is evidenced not only by the split that now exists in the Circuits but also by the conflict between the Seventh Circuit's decision in this case and its prior decision in *NLRB* v. *Ladish Co., supra.* Furthermore, notwithstanding the previous repeated reversals by the Courts of Appeals, the Board has zealously adhered to the principle that bargaining about food prices is required by the Act. The resulting uncertainty about whether prices for in-plant food services are or are not subject to mandatory bargaining is detrimental to the development and maintenance of stable collective bargaining relationships.

As the Board pointed out in *Ladish Co.,* 219 NLRB 354 (1975), *enf. denied,* 538 F. 2d 1267 (1976), many employers provide food services for employees.[5] The Court below treated

5. The Board stated:

"In a recent survey, 54 percent of the responding companies provided food services for employees in a lunchroom with vending machines. Employee cafeterias are provided in 43 percent of all companies. Vending machines (but not in a lunchroom) are provided by 25 percent of the companies, and lunchrooms with snack bar service are provided in 15 percent. Because the services vary from one company location to another and respondents were asked to check any of the services provided, the percentages add to more than 100. The extended use of vending machines is shown by a survey made by the Field Research Division of the Paper Cup & Container Institute, New York. Of 1,264 plant officials who replied to the survey, better than 8 of 10 are using vending machines, with over 1 of 5 depending entirely upon automatic vending. 4 Labor Policy and Practice, 245: 201-203. See also data and conclusions cited in fn. 30 of the Administrative Law Judge's Decision in *McCall Corporation, supra.*" (219 NLRB at 357, n. 27)

the subject as controlled by the details of each case and, in particular, by the distinctions discussed above. The tenuous nature of those distinctions, singly or in combination, necessarily leaves employers at whose facilities in-plant food services are provided uncertain about whether bargaining as to food prices is required. This uncertainty is compounded by the differences in the conclusions reached by the Circuits, and, indeed, by the different panels of the Seventh Circuit. Thus an employer—and for that matter the representative of the employees as well—must, in the absence of a determination by this Court, conjecture not only as to how much weight each combination of distinctions will be accorded but also as to which Court of Appeals or panel thereof will hear the case.

The confusion which now exists and which affects a large number of employers and employees can only be resolved by this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1978.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 77-1707

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued January 10, 1978— Decided February 22, 1978

Before SWYGERT and SPRECHER, *Circuit Judges,* and GRANT, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The question in this appeal is whether in-plant cafeteria and vending machine food prices and services are "terms and conditions of employment" under Section 8(d) of the National Labor Relations Act, as amended, or

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

materially or significantly affect or have impact upon such terms and conditions under the facts and circumstances of this case.[1]

The appeal comes here for review of an order of the National Labor Relations Board and upon the Board's cross-application for enforcement. On December 1, 1976, an Administrative Law Judge issued his decision recommending that the complaint be dismissed. The Board's decision and order issued on July 11, 1977, reversed the Administrative Law Judge and concluded that cafeteria and vending machine services and prices are mandatory subjects of collective bargaining. 230 NLRB No. 101 (1977).

I

The petitioner, Ford Motor Company (Company), operates an automotive parts stamping plant in Chicago Heights, Illinois, where it employs approximately 3600 hourly-rated production employees working in three shifts and represented by the intervenor, Local 588 of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Union). The Company and Union have been parties to a series of national collective bargaining agreements supplemented by local agreements. There is no other union in the plant.

The Company provides its employees with two air-conditioned cafeterias seating a total of 450-600 persons and five air-conditioned and enclosed vending machine areas, called "coke cribs," with a total seating capacity of 235-300 persons. All employees have a 30-minute lunch period. The parties agreed that it was not feasible for employees to leave the plant during their food breaks. Mobile food vending trucks are not permitted on plant property.

Employees are permitted to bring their own food into the plant and it may be eaten in the cafeteria or coke crib areas. However, the food brought in may only be stored in ventilated

1. 29 U. S. C. § 158(d).

but not air-conditioned locker rooms. The employees have no refrigeration facilties and in the summer months the lockers become "very hot and sticky and smelly" with temperatures frequently ranging from 80 to 100 degrees and causing food spoilage. The Company has occasionally employed exterminator services because of unsanitary conditions in the locker rooms.

Based on physical counts of usage, it appeared that assuming a normal 5-day workweek, about 20-30% of the employees used the Company cafeterias each day and, assuming that all employees used the vending machines, each employee used vending machines about 3½ times per day.

The two cafeterias and five vending machine areas are serviced by a caterer, ARA Services, Inc., under a contract with the Company dated February 11, 1972, which provides that ARA shall:

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by Ford, and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or contractor.

Under the agreement the Company furnishes rent-free space, rent-free equipment (except the vending machines), all needed utilities and maintenance whereas ARA furnishes the vending machines, all food and beverages, and management and labor. The agreement further provides that ARA shall be reimbursed for all direct costs of food and vending operations plus an allowance of general administrative costs equivalent to 4% of net receipts plus a service fee of 5% of net receipts. If gross receipts are less than the sum of the costs of the operation plus the service fee, the Company is obligated to reimburse ARA for the deficit by an annual amount not to exceed $52,000. For all recent years, the operation has been on a loss basis and the Company has made up the annual loss to ARA. Finally, the agreement provides that ARA is an independent contractor and

that the contract is terminable by either party upon 60 days written notice.

Beginning with a letter dated October 29, 1967, from the Company to the Union entitled "Improved Vending and Cafeteria Service," the parties have bargained over various aspects of the quality of service provided by the caterer (at that time a predecessor of ARA). The 1967 letter provided in part that:

> The Company recognizes *its* continuing responsibility for the satisfactory performance of the caterer and for providing the Union with a means for registering and expeditious handling of complaints concerned with such performance.

The letter, which was incorporated into the 1970 local collective bargaining agreement, dealt with the staffing of service lines, adequate cafeteria supervision, certain sanitary conditions, restocking and repairing of vending machines, and menu variety.

The local agreement in effect during the material times involved in this case became effective June 20, 1974, and continued through September 1976. The 1974 agreement included the above "recognition" clause in slightly modified language and other provisions dealing with cafeteria and vending services.[2]

2. 1. CAFETERIA SERVICE

The company assures the Union that steam table items will be available at all times during the regular lunch period and that a comparable selection of entrees, salads and desserts will be available during all regular lunch periods. In addition, the Company will make arrangements for a delicatessen type sandwich service in the cafeteria. Cafeteria supervision will be available during all lunch periods to ensure that employees will be served in a reasonable length of time through the main serving lines as well as to provide for the adequacy of food service, condiments and utensils.

2. VENDING SERVICE AND VARIETY

To assure that vending machines will receive prompt servicing in the event of a mechanical breakdown, a sticker will be affixed to each machine indicating the number to call for repair. Further, the Company assures the Union that a greater variety of selections will be maintained in the existing vending machines

(Footnote continued on next page.)

The Company has consistently refused to bargain with the Union concerning prices set by ARA with its approval. The present controversy developed when the Company informed the Union that cafeteria and vending machine prices would be increased on February 9, 1976. By a letter to the Company dated February 13, the Union sought "to bargain with you regarding [cafeteria and vending] prices and services." On February 18, the Company responded by letter stating that "[s]imilar requests have been made by the Union in the past, and the Company's response has been the same, that food prices and services are not a proper subject for negotiations."[3]

Beginning on February 16, 1976, there was a boycott by Union members of the cafeteria and vending operations, which ended as to the cafeteria on May 19, 1976, and as to vending machines on June 7, 1976. The Administrative Law Judge found that "a substantial reason for abandoning the boycott was its ineffectiveness in reducing prices." He also noted that employees mostly brought in their lunches during the boycott and its termination was due in part to the onset of hot weather with consequent problems of spoilage of food.

Meanwhile on April 12, 1976, the Union had filed an unfair labor practice charge against the Company. On May 26, 1976,

(Footnote continued from preceding page.)

and that the quality of such items will continue to meet Company standards.

The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.

3. By letter of March 23, 1976, the Union requested from the Company information regarding cafeteria and vending machine operations, including the Company's maintenance responsibilities, profits from food operations, control of prices and contractual relations with the caterer. On April 9, the Company denied the Union's request for information. Most if not all the information requested was disclosed in the proceedings before the Board. The Board found and concluded that the requested information was relevant to food prices and services, and that its disclosure was necessary to the Union's fulfilling its duty as a bargaining agent.

the Regional Attorney for the Board's General Counsel for Chicago issued a complaint against the Company. Our jurisdiction is derived from Sections 10(e) and (f) of the Act as amended (29 U. S. C. § 160), the alleged unfair labor practices having occurred in Illinois.

II

As early as 1949, the National Labor Relations Board held that an employer had a statutory duty to bargain regarding the prices of meals served at logging camps. *Weyerhaeuser Timber Co.*, 87 NLRB 672 (1949). Through the years the Board has persisted in its position that in-plant cafeteria and vending machine food prices and services are terms and conditions of employment and hence mandatory subjects of bargaining. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966); *McCall Corp.*, 172 NLRB 540 (1968); *Package Machinery Co.*, 191 NLRB 268 (1971); and *Ladish Co.*, 219 NLRB 354 (1975).

These last four cases were all reversed by courts of appeals. *Westinghouse Electric Corp.* v. *N. L. R. B.*, 369 F. 2d 891 (panel decision), 387 F. 2d 542 (supervening en banc decision, 4th Cir. 1967); *McCall Corp.* v. *N. L. R. B.*, 432 F. 2d 187 (4th Cir. 1970); *N. L. R. B.* v. *Package Machinery Co.*, 457 F. 2d 936 (1st Cir. 1972); and *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267 (7th Cir. 1976).

The Board takes the view that an Administrative Law Judge's duty is to apply established Board precedent which the Supreme Court of the United States or the Board itself has not reversed, despite reversals of Board precedent by courts of appeals. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). In the present case, the Administrative Law Judge reasoned that despite the Board's precedents in *Westinghouse, McCall, Package Machinery* and *Ladish*, the reversals of those cases by courts of appeals followed by the failure of the Board to seek certiorari from the Supreme Court in the most recent case, *N. L. R. B.* v. *Ladish*

Co., 538 F. 2d 1267 (7th Cir. 1976), indicated that the Board had acquiesced and changed its former position. The Administrative Law Judge therefore recommended that the complaint against Ford Motor Company be dismissed.

The Board rejected the Administrative Law Judge's reasoning and said that "[w]ith all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining." 230 NLRB No. 101 (1977).

III

Section 8(a)(5) of the National Labor Relations Act, as amended,[4] makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees. . . ." Collective bargaining is defined in Section 8(d) as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .[5]

4. 29 U. S. C. § 158(a)(5).

5. 29 U. S. C. § 158(d). The original National Labor Relations Act of 1935 (the Wagner Act) did not contain a definition of collective bargaining, but Section 9(a) provided that a majority union shall be the exclusive representative of all employees in an appropriate unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or *other conditions of employment* . . ." (Emphasis added.) When the Labor Management Relations Act of 1947 (the Taft-Hartley Act) substantially amended the National Labor Relations Act, Section 9(a) was left unchanged and Section 8(d) was first included. The parties to this case have not directed our attention to, nor has our own research located, any legislative history which would be particularly persuasive in an attempt to give further content to the phrase "terms and conditions of employment" in Section 8(d) or "conditions of employment" in Section 9(a). *See* Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), Vols. I and II. Possibly the only assistance in interpreting these phrases which the history affords is summarized by Mr. Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 at 220-221 (1964).

The Supreme Court decision giving definitive substance to the words "terms and conditions of employment" is *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964). Inasmuch as what may be the key message of *Fibreboard* seems to have been overlooked or at least summarily considered in subsequent cases, it is crucial to the outcome of this case to examine Mr. Chief Justice Warren's opinion for the Court and Mr. Justice Stewart's concurring opinion in some detail.

The Court's *Fibreboard* opinion goes to great pains to emphasize that each categorization of what is or is not a term or condition of employment or what has or has not sufficient effect or impact upon a term or condition so as to convert it into a mandatory subject of bargaining, must depend upon the facts and circumstances of each case. At the outset of the opinion, the Court said at 209:

> We agree with the Court of Appeals, that, *on the facts of this case*, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively.
> (Emphasis added.)

At the end of the portion of the opinion dealing with this subject,[6] the Court said at 215:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

6. In the middle of the opinion the Court said that "[t]he *facts of the present case* illustrate the propriety of submitting the dispute to collective negotiation." (Emphasis added.) 379 U. S. at 213.

The Stewart concurrence expanded further on the same theme[7] at 218:

> The question posed is whether *the particular decision* sought to be made unilaterally by the employer *in this case* is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." *That is all the Court decides.* The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. *The Court holds no more than that this employer's decision* to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively. *Within the narrow limitations implicit in the specific facts of this case,* I agree with the Court's decision.
> (Emphasis added.)

Even as all "contracting out" situations are not necessarily either mandatory bargaining subjects or not mandatory bargaining subjects, not all in-plant cafeteria and vending machine food prices and services are necessarily one or the other. What is peculiarly and particularly a question of fact should not be converted into a matter of law, as *Fibreboard* strained to make clear. Having done this, Mr. Justice Stewart then sought to establish some guidelines for making the factual distinction. While much of his concurrence is applicable only to "contracting out" situations, some of his observations are applicable generally.

For example, he gave recognition to the standard that a particular matter may be either a term or condition of employment or may affect or have such an impact upon a term or

7. More recently, in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971), the Supreme Court held that "*in each case* the question is . . . whether [a particular matter] vitally affects the 'terms and conditions' of . . . employment."

condition that it nevertheless becomes a mandatory subject of bargaining. At the same time he limited that standard as not encompassing all matters which have an "effect-impact." He said at 223:

> While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may *affect* job security is a subject of compulsory collective bargaining.
>
> * * * * *
>
> In many of these areas the *impact* of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." (Emphasis added.)

Mr. Justice Brennan, writing for the Court in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971), said "[w]e agree with the Board that the principle of . . . *Fibreboard* is . . . whether [a particular matter] vitally affects the 'terms and conditions' of . . . employment.

Based principally upon the Stewart concurrence in *Fibreboard*, the courts of appeals have sought to further develop the standard for determining whether a particular matter "affects" or "has an impact upon" a term or condition of employment. Some courts have limited the "effect-impact" test by requiring a "material" or "significant" effect or impact (*see Seattle First National Bank* v. *N. L. R. B.*, 444 F. 2d 30, 33 (9th Cir. 1971)), or a "substantial adverse effect" upon the employees (*see District 50, United Mine workers* v. *N. L. R. B.*, 358 F. 2d 234, 237 (4th Cir. 1966).[8]

8. As applied to in-plant cafeteria and vending machine food prices and services *see Westinghouse, supra* 387 F. 2d at 548 (". . . a significant or material relationship to wages, hours, or other conditions of employment") and *McCall, supra* 432 F. 2d at 188 ("whether the issue 'materially affects the conditions of employment' ") (Sobeloff, J., dissenting).

IV

Applying the *Fibreboard* principles to the case at hand will perhaps be simpler if we first determine how they have been applied in this circuit generally and in this and other circuits specifically to in-plant feeding.

This court adopted the case-by-case approach in interpreting the analogous phrase "working conditions" in the Railway Labor Act,[9] holding that "["t]he Act does not fix or authorize anyone to fix generally applicable standards for working conditions . . . ." *In re Chicago North Shore & M. R. Co.*, 147 F .2d 723, 727 (7th Cir.) *cert. denied*, 325 U. S. 852 (1945).

In *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267, 1272 (7th Cir. 1976), the Court said that "[w]e hold that vending machine food prices are not a material or significant condition of employment *at Ladish*" (emphasis added). Furthermore, the opinion of Judge Pell, which relies upon *Fibreboard* and upon *Seattle First National Bank* v. *N. L. R. B., supra*, makes it clear that the Court is applying the material or significant effect or impact standard rather than what may seem to be an entirely different standard of "material or significant condition," which, of course, would be contrary to the statute itself.[10]

The result in the *Ladish* case and the seemingly contrary dicta in *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949), that "a provision for in-plant feeding . . . could properly be designated as 'wages,' and . . . [is one of the] 'conditions of employment,' are easily

9. Section 2, First of the Railway Labor Act provides that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and *working conditions* . . . ." (Emphasis added.) 45 U. S. C. § 152, First.

10. 29 U. S. C. § 158(d) makes terms and conditions of employment mandatory subjects of collective bargaining, whether material or significant or not. *Fibreboard* expanded the plain meaning of the statute to include matters having material or significant effect or impact upon terms or conditions.

reconciled on this basis, namely, that this circuit applies the case-by-case approach and the standard of review of material or significant effect or impact upon a term or condition of employment.

In two of the other three in-plant food cases, the case-by-case approach was used. *Westinghouse, supra* 387 F. 2d at 547 (". . . it appears that the Supreme Court's decision in *Fibreboard* was limited to a particular situation . . . ."); *McCall, supra* 432 F. 2d at 187 (*Westinghouse* was decided "under the circumstances of the case"). Nothing was said in this regard in *Package Machinery, supra,* which relied heavily, however, on *Westinghouse* and *McCall.* Both *Westinghouse* and *McCall* also applied the standard of review of material or significant effect or impact. *See* footnote 8, *supra.*

Finally, in the closely-analogous cases determining whether company-furnished housing is a term or condition of employment, courts have held that the result depends upon an evaluation of the relevant facts of the particular case. *See American Smelting & Refining Co.* v. *N. L. R. B.,* 406 F. 2d 552, 553-554 (9th Cir.), *cert. denied,* 395 U. S. 935 (1969).

Whether in-plant cafeteria and vending machine food prices and services are a term or condition of employment is a close and difficult question.

Mr. Justice Stewart, concurring in *Fibreboard Corp.* v. *N. L. R. B.,* 379 U. S. 203, 222 (1964), said that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment" and "[w]hat one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment." The food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment.

Ladish itself recognized that some aspects of in-plant feeding are terms and conditions of employment. The Court there noted

that "[t]he Company does not dispute that it is required to bargain over hours of employment, including the lunch period." 538 F. 2d at 1271. This Court, in *Ladish,* however, distinguished "the vague dicta in *Inland Steel,* which in any event could mean nothing more than the obvious requirement that a company would have to bargain on some phases of 'in-plant feeding,' *e.g.* the time for the purpose." *Id.* at 1272.

The following analogous matters have been held to be terms or conditions of employment and hence mandatory subjects of collective bargaining:

> *Safety rules and practices—N. L. R. B.* v. *Gulf Power Co.,* 384 F. 2d 822, 825 (5th Cir. 1967).
>
> *Rules concerning employee discipline, smoking and dress—S. S. Kresge Co.* v. *N. L. R. B.,* 416 F. 2d 1225, 1229-1230 (6th Cir. 1969).
>
> *Rental rate for company-furnished housing—American Smelting & Refining Co.* v. *N. L. R. B.,* 406 F. 2d 552 (9th Cir.), *cert. denied,* 395 U. S. 935 (1969); *N. L. R. B.* v. *Lehigh Portland Cement Co.,* 205 F. 2d 821 (4th Cir. 1953).
>
> *Gas price discount for employees—N. L. R. B.* v. *Central Illinois Public Service Co.,* 324 F. 2d 916 (7th Cir. 1963).
>
> *Level of heat in plant—N. L. R. B.* v. *Washington Aluminum Co.,* 370 U. S. 9 (1962).

But despite the fact that we are dealing with a close question, we accept, as we must in the absence of *en banc* consideration, the holding of *Ladish,* which we interpret to mean that under the facts and circumstances *Ladish* in-plant vending machine food prices were not a term or condition of employment.

We hold, however, that under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact

upon terms and conditions of employment, and therefore are mandatory subjects of bargaining.

The facts and circumstances of this case (set forth in Part I) differ from those in *Ladish, Westinghouse, McCall* and *Package Machinery* as summarized in chart form as follows:

	Ford	Ladish	Westinghouse	McCall	Package
Number of Unions	1	7	3	Several	1
Subsidization					
Rent-free space	Yes	Yes	Yes	Company-operated	Yes
Rent-free equipment	Yes	No	Yes		Yes
Utilities	Yes	Yes	Yes		Yes
Maintenance	Yes	No	Yes		Yes
Cash (per year)	$52,000	No	$1800 once		$8940
Employer Control					
Prices	Yes	No	Yes	Yes	Yes
Food quality	Yes	No	Yes	Yes	Yes
Use of Facilities					
Cafeteria	20-30%	None	40-45%	No evidence	50%
Vending machines	3½ per day	70%	Not at issue	25-95%	98%
Time for Lunch	30 mins.	15 mins.	30-45 mins.	10-30 mins.	20-30 mins.
Alternatives					
Outside restaurant	Inadequate	Not allowed	Inadequate	Adequate	Several
Paper-bagging	Not feasible	30%	55-60%	Some	Yes
Mobile vendors	Not allowed	Not allowed	Yes	Yes	No evidence
Attempted Boycott	Failed	None	None	None	None
Prior Bargaining	Since 1967	None	None	None	None

We continue to operate under the constraints of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 (1951), which referred to the National Labor Relations Board "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." The Board made the following distinctions between the present case and *Ladish:*

> Unlike *Ladish,* where the respondent had no input on prices, the Respondent in this case retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement. In addition, there also exists the possibility for the Respondent to make a profit on the food service operation. Also, since 1967, the parties in this case have bargained over in-plant food services. No such bargaining history was present in *Ladish*. Moreover, in *Ladish,* the court implied that "brown-bagging" is a viable alternative to purchasing lunch from the commercial food service. However, in this case, employees have complained about spoilage of food stored in their lockers until lunch, as well as unsanitary conditions in the locker room (wherein the Respondent has found it necessary on occasion to exterminate). Additionally, the employees have apparently been so concerned with the food pricing that over half of them participated in a boycott of the Respondent's food service operations. There was no such labor strife involved in *Ladish*. Lastly, in *Ladish* the employees were represented by seven unions. The court therein projected that each time the food prices were raised "the Company could be compelled to engage in seven rounds of negotiations." 538 F. 2d at 1272. This fact, the court declared, "provides a good example of a situation in which bargaining could be both disruptive of stable relations and economically wasteful." *Id.* In the instant case, however, the employees are represented by a single union. While we adhere to the view that the number of unions representing employees at a single plant is not a factor in resolving this issue, we nevertheless note that, even in the court's view, there is no potential for conflicting union demands in this case.

We agree with the Board that the distinctions which it has found are material and significant, that those distinctions have an effect and impact upon terms and conditions of employment, and that therefore, in-plant cafeteria and vending machine food prices and services are mandatory subjects of bargaining under the facts and circumstances of this case.

This result will not be unduly burdensome to the Company. The obligation to bargain upon terms and conditions of employment "does not compel either party to agree to a proposal or require the making of a concession." 29 U. S. C. § 158(d). The order we are enforcing does not require the Company to bargain about every proposed price change in food prices before putting such change into effect but "to bargain on such price change only after . . . [it is] determined unilaterally and upon a request of the Union."

The Board's order of July 11, 1977, is enforced and the Company's petition for review as denied.

APPENDIX B

230 NLRB No. 101

FPM
D—2635
Chicago Heights, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FORD MOTOR COMPANY (Chicago Stamping Plant)	
and	Case 13—CA—15340
LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA	

DECISION AND ORDER

On December 1, 1976, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent Ford Motor Company (hereinafter called Respondent), at its Chicago Stamping Plant, refused to bargain and supply information to Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter called Union), in regard to the plant's vending machine and cafeteria prices and services. The Administrative Law Judge found that, on the basis of the Board's decisions, in-plant food prices are a mandatory subject of bargaining. However, he nevertheless found that the Board's action in failing to seek review of the Seventh Circuit's reversal of *Ladish*,[2] to the latest Board decision in this area, considered in light of other reviewing courts' refusal to uphold Board decisions in this area (see *infra*), was a decision to hold that in-plant food prices are not a mandatory subject of bargaining.[3] Accordingly, he concluded that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain about such prices and by not supplying the requested information in connection therewith. We disagree on all counts.

The facts are not in dispute and may be summarized as follows: The Respondent provides its employees with two air-conditioned cafeterias and five air-conditioned vending areas (or coke cribs). The cafeteria and vending areas are serviced by ARA Services pursuant to a 1972 agreement with the Respondent. Under the agreement, ARA furnishes food and machines. Section 2(d) of the contract states that ARA shall:

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by Ford, and in accordance with a price and portion

1. The General Counsel has made a motion to correct the transcript and states that all parties agree to the corrections. In the absence of any opposition thereto, the motion is hereby granted.

2. 219 NLRB 354 (1975), enforcement denied 538 F. 2d 1267 (C. A. 7, 1976).

3. The Administrative Law Judge did not discuss the allegations that Respondent refused to bargain as to services.

list for said manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or Contractor.

Section 3(a) of the agreement provides that ARA be reimbursed for all direct costs of the food and vending operations along with a surcharge consisting of an allowance for general administrative costs equivalent to 4 percent of net receipts and a service fee of 5 percent of net receipts. Should the receipts exceed cost plus the 9 percent surcharge, the excess funds shall be returned to the Respondent. When revenues do not exceed the costs of the operation plus the service fee, the Respondent is obligated to subsidize ARA, and in recent years, at times, has had to do so. The agreement further states that the contract is terminable by either party upon 60 days' notice.

Although Respondent has at all times refused to bargain as to the prices set by ARA with its approval, it has in the past bargained over the quality of services provided by that caterer. Since 1967, the local contract has included provisions dealing with vending and cafeteria services. The contracts have covered the staffing of service lines, adequate cafeteria supervision, restocking and repairing vending machines, and menu variety. The 1974 local agreement also states, "The Company recognized its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance."

Employees have a 30-minute lunch period and two 22-minute rest periods. They are not allowed to leave the plant during the 22-minute breads, and it is not feasible for them to leave during the lunch period. Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate. Only an extremely small number of employees (approximately 12 of the 3,600) actually leave the plant during the lunch period.

Employees are permitted to bring their own food into the plant. However, the food must be stored in personal lockers.

These lockers are located in rooms which are ventilated but not air-conditioned. There are no refrigeration facilities. During the summer months, the rooms become very hot (temperatures reaching between 80 to 100 degrees) and sticky, and employees have complained about food spoilage. The Respondent has had occasion to use exterminator services upon complaints as to santiary conditions in the locker room.

On February 6, 1976, the Respondent informed the Union that cafeteria and vending machine prices would be increased by an unspecified amount on February 9. The Respondent refused the Union's request to discuss the increase first, and on February 9 the prices were increased from 5 to 10 cents an item. On February 13, the Union sent the following letter to the Respondent's industrial relations manager, Brown, asking to bargain about prices and services:

Dear Mr. Brown:

As the certified Bargaining Agent for your Production and Maintenance Employees, Local 588 is concerned about prices and services in cafeteria and vending operations. We would like to bargain with you regarding these prices and services.

As you know this is a subject of great concern. Good food at reasonable prices is considered to be a condition of employment by our members. If we discuss this properly, we may be able to reach full agreement prior to opening negotiations for a new contract.

Sincerely,

RICHARD W. MARCO

The Respondent responded to the letter on February 18:

Dear Mr. Marco,

This letter is in response to your letter dated February 13, 1976, requesting to meet with the Company for the purpose of negotiating prices and services provided by A.R.A. food service.

Similar requests have been made by the Union in the past, and that Company's response has been the same, that

food prices and services are not a proper subject for negotiations. Appropriately, your request is denied.

T. M. BROWN

In the meantime, the Union, on February 16, 1976, began a boycott of the food services operations and over half of the employees participated. The boycott lasted over a month, but did not result in any changes in the prices. On March 23, 1976, the Union requested information concerning the Respondent's role in cafeteria and vending operations in order to administer the existing contract and to prepare for upcoming negotiations. The Respondent declined.

The Administrative Law Judge correctly found—and the Respondent concedes in its brief—that the present case falls within the factual and legal context of the Board's decisions in *Westinghouse Electric Corporation*,[4] *McCall Corporation Package Machinery Company*,[6] and *Ladish*,[7] and that on the basis of these decisions in-plant food prices are a mandatory subject of bargaining. Had he followed the principles established in such cases, therefore, he necessarily would have found, as we do, that Respondent violated 8(a)(5) and (1) when it refused to bargain about such matters. However, as previously indicated, the Administrative Law Judge, relying on the First,[8] Fourth,[9] and Seventh,[10] Circuits' reversal of the Board's finding of a violation in the above-mentioned cases, coupled with the Board's failure to seek certiorari in *Ladish*, erroneously found that the Board has since decided that in-plant food prices are

4. 156 NLRB 1080 (1966).

5. 172 NLRB 540 (1968).

6. 191 NLRB 268 (1971).

7. 219 NLRB 354 (1975).

8. *Package Machinery Company* v. *N. L. R. B.*, 457 F. 2d 936 (C. A. 1, 1972).

9. *Westinghouse Electric Corporation* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4, 1967); *McCall Corporation* v. *N. L. R. B.*, 432 F. 2d 187 (C. A. 4, 1970).

10. *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267 (C. A. 7, 1976).

not a mandatory subject of bargaining and hence there was no violation in Respondent's refusal to bargain about them.

With all due respect to the First, Fourth, and Seventh Circuits, we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining.[11] Nor does the Board's failure to seek certiorari in those cases indicate an abandonment of its position that in-plant food prices are a mandatory subject of bargaining, and any assumptions to the contrary are totally unfounded and unwarranted.[12] Accordingly,

11. We note that the instant case, on its facts, is in many respects a stronger case than *Ladish* for adhering to our position. Unlike *Ladish*, where the respondent had no input on prices, the Respondent in this case retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement. In addition, there also exists the possibility for the Respondent to make a profit on the food service operation. Also, since 1967, the parties in this case have bargained over in-plant food services. No such bargaining history was present in *Ladish*. Moreover, in *Ladish*, the court implied that "brown-bagging" is a viable alternative to purchasing lunch from the commercial food service. However, in this case, employees have complained about spoilage of food stored in their lockers until lunch, as well as unsanitary conditions in the locker room (wherein the Respondent has found it necessary on occasion to exterminate). Additionally, the employees have apparently been so concerned with the food pricing that over half of them participated in a boycott of the Respondent's food service operations. There was no such labor strife involved in *Ladish*. Lastly, in *Ladish* the employees were represented by seven unions. The court therein projected that each time the food prices were raised "the Company could be compelled to engage in seven rounds of negotiations." 538 F. 2d at 1272. This fact, the court declared, "provides a good example of a situation in which bargaining could be both disruptive of stable relations and economically wasteful." *Id.* In the instant case, however, the employees are represented by a single union. While we adhere to the view that the number of unions representing employees at a single plant is not a factor in resolving this issue, we nevertheless note that, even in the court's view, there is no potential for conflicting union demands in this case.

12. By relying on U. S. Court of Appeals' decisions which are contrary to applicable Board precedent, the Administrative Law Judge in this case has committed an error. It is not for an Administrative Law Judge to speculate as to what course the Board should or would follow where a circuit court has expressed disagreement with the Board's views. That is the province of the Board alone. It

(Footnote continued on next page.)

we find that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain about the price increases it placed into effect.

We further find that Respondent violated the same sections of the Act by also refusing to bargain about the food services provided by it through a contract with ARA. The Respondent acknowledge that certain aspects of food services are mandatory subjects of bargaining and that the 1974 contract between itself and the Union contained provisions concerning food services.[13] Respondent, however, argues that it has not refused to bargain about the food services provided here. We find no basis in the record to support that argument. To the contrary, the Respondent in its denial of the Union's request to bargain about the food prices and services, *supra,* stated, 'food prices and services are not a proper subject for negotiations." We cannot imagine a more explicit refusal to bargain. Nor is there any evidence that bargaining about such service occurred, or that Respondent, its stated refusal to the contrary, stood ready or attempted to bargain about food services. Accordingly, we find that Respondent refused to bargain about the food services provided its employees.

The Union also requested information about the Respondent's role in the cafeteria and vending machine operations in order to police the existing contract and to prepare for bargaining.

(Footnote continued from preceding page.)
remains the Administrative Law Judge's duty to apply established Board precedent which the Supreme Court or the Board has not reversed. *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616 (1963); *Novak Logging Company,* 119 NLRB 1573, 1575-76 (1958); *The Prudential Insurance Company of America,* 119 NLRB 768, 773 (1957).

13. The Board and the courts have found a wide variety of subjects to be material conditions of employment falling within the scope of compulsory bargaining. Among such conditions are in-plant feeding, *Inland Steel Company* v. *N. L. R. B.,* 170 F. 2d 247 (C. A. 7, 1948); improvements in lunchroom equipment and supplies, *Preston Products Company, Inc.,* 158 NLRB 452 (1966); the scheduling of coffeebreaks, and providing the service of free coffee, *Fleming Manufacturing Company,* 119 NLRB 452 (1967).

We have found that food prices and services are mandatory subjects of bargaining. The requested information is clearly relevant to those subjects and hence is necessary to the Union's fulfilling its duty as a bargaining agent also to those matters.[14]

The Remedy

Having found that the Respondent has unlawfully refused to bargain and supply information to the Union concerning food prices and services, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. As we held in *Westinghouse Electric Corp., supra,* "It is sufficient compliance with the statutory mandate . . . if management honors a specific union request for bargaining about changes made or to be made." 156 NLRB at 1081. Accordingly, as in *Westinghouse,* our order will not require the Respondent "to bargain about every proposed price change in food prices before putting such change in effect." we will require the Respondent to bargain on such price change only after they are determined unilaterally and upon a request of the Union.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (17) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been and is the exclusive representative of all employees in the following unit within the meaning of Section 9(a) of the Act:

> All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department,

14. *N. L. R. B.* v. *Acme Industrial Co.,* 385 U. S. 432 (1967).

employees engaged in designing, drafting, laboratory, photographic and other technical, experimental and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing, on and since February 18, 1976, to bargain collectively with the Union as the exclusive representative of its employees in the afore-said bargaining unit, concerning plant vending machine and cafeteria services and price changes, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By refusing, on and since February 18, 1976, to bargain and to supply the information requested by the Union concerning the Respondent's role in the cafeteria and vending machine operation, which information is necessary for the Union's performance of its duty as exclusive bargaining agent, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ford Motor Company, Chicago Heights, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit with respect to food services and changes in food prices in the vending machines and cafeteria:

All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department, employees engaged in designing, drafting, laboratory, photographic and other technical, experimental and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) Refusing, upon request, to supply the aforesaid labor organization with the information necessary for collective bargaining, in relation to its role in the cafeteria and vending machine operation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to food services and any changes, now in effect or hereafter made or proposed, in food prices charged employees in the vending machines and cafeterias.

(b) Upon request, supply the above-named labor organization with information necessary for collective-bargaining, in relation to its part or role in the cafeteria and vending machine operations.

(c) Post at its plant in Chicago Heights, Illinois, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. July 11, 1977.

JOHN H. FANNING,
Chairman

JOHN A. PENELLO,
Member

BETTY SOUTHARD MURPHY,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

15. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive representative of all our employees in the bargaining unit described below with respect to food services and changes in food prices in the vending machines and cafeterias:

> All production and maintenance employees in the Respondent's facility at Chicago Heights, Illinois, but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department, employees engaged in designing, drafting, laboratory, photographic and other technical, experimental, and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, in relation to its role in the cafeteria and vending machine operation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union, as the exclusive representative of all our employees in the aforesaid unit with respect to food services and any changes, now in effect or hereafter made or proposed, in

food prices charged our employees in the vending machines and cafeterias.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining in relation to its role in the cafeteria and vending machine operation.

FORD MOTOR COMPANY
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Bldg., Rm. 881, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312—353—7597.

JD-793-76
Chicago Heights, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT) and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA *Lawrence E. Dube, Esq.*, and *Frank J. Ziegler, Esq.*, for the General Counsel. *William J. Rooney, Esq.*, Dearborn, MI, for Respondent. *Jerome Schur (Katz & Friedman)*, Chicago, IL, for the Union.	Case No. 13-CA-15340

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: This case was heard on August 16, 1976, in Chicago, Illinois, upon a complaint issued by the General Counsel on May 16, 1976, and an answer filed by Respondent Ford Motor Company. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America intervened after the hearing, and I shall refer to it and its Local 588 collectively as the Union unless separate identification be necessary. The Company is an employer within Section 2(6) and (7) of the Act, and the International and Local 588 are labor organizations within Section 2(5) of the Act.

I. The Unfair Labor Practices

The issue

Respondent has a Stamping Plant in Chicago Heights, Illinois. The plant buildings occupy an area one-quarter mile by one-quarter mile and employ approximately 3,600 hourly-rated production employees on a three-shift operation. These employees are represented by the International Union, with Local 588 as its administrative component, and there is no other union in the plant. Collective-bargaining agreements have been operative between the parties at all material times here.

The principal issue is whether Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union concerning cafeteria and vending machine prices at the Stamping Plant. Conceding this refusal to bargain, Respondent asserts that cafeteria and vending machine prices are not "terms and conditions of employment" within Section 8(d) of the Act and, therefore, that it was under no obligation to negotiate over that subject. Whether such prices are a mandatory subject of bargaining under the Act is not a novel question. As will be discussed, Board decisions uniformly have held that it is mandatory, while those Courts of Appeals dealing with the problem have just as uniformly held otherwise.

Cafeteria and vending machine facilities

Respondent makes available to its employees certain in-plant cafeteria and vending machine services which are provided by ARA Services, Inc., pursuant to a 1972 "caterer-vending" agreement between Respondent and ARA.[1] This agreement provides, in part, that ARA will manage and operate the manual food service at the plant and install, maintain, and service the vending machines; provide all food, beverages, and materials for the

1. ARA has been providing such services since 1970. Another caterer provided similar services before that time.

operation along with necessary management and labor personnel; furnish products of quality in accordance with specifications approved by Respondent and in accordance with a price and portion list that shall also have been submitted to Respondent and that shall be subject to review at either party's request; permit Respondent to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness. The agreement provides that ARA be reimbursed for all direct costs of food and vending operations along with an allowance for general administrative costs equivalent to 4 percent of net receipts and a service fee of 5 percent of such receipts. If gross receipts from the operation are less than the sum of the costs of the operation plus the service fee, Respondent is obligated to reimburse ARA for the deficit by an annual amount not to exceed $52,000. The parties stipulated in this connection that

> In some months revenues exceed costs and in some months the opposite has occurred. When revenues exceed costs, the Employer realizes income, and when costs exceed revenues a loss occurs. For all recent years, the operation has been on a loss basis and the Employer has made up the loss to ARA.

The agreement further provides that ARA is an independent contractor and that the contract is terminable by either party upon 60 days' notice.

ARA maintains two cafeterias and five vending machine areas (or coke cribs) in the plant for bargaining unit employees.[2] The larger (or "hourly") cafeteria, on the second floor of the plant, serves hot food from steam tables and also houses coin-operated vending machines which dispense beverages, hot and cold food, pastry, and candy. This cafeteria is air-conditioned and seats between 400 and 500 persons. It is open for breakfast between 5 a.m. and 8 a.m., and also during lunch periods. It is open during shift changes, as well, but only food from the vending machines is available at those times.

2. ARA also maintains an Executive dining room and a salaried cafeteria which are not available to bargaining unit employees.

The second (or "satellite") cafeteria also is air-conditioned; it accommodates 50 to 100 persons and is open for two of the three lunch periods on the day and evening shifts. This cafeteria does not have a steam table or cafeteria service; it does have approximately 12 vending machines serving hot and cold sandwiches, beverages, stews, soups, spaghetti, pastry, ice cream, and candy.

The five coke cribs, which are air-conditioned and enclosed, are scattered throughout the plant and are open during all meal and rest periods. Each of four cribs accommodates 40 to 50 persons, and the fifth between 75 and 100. The cribs have vending machines dispensing the same food items available in the satellite cafeteria.

Employees on all three shifts have a 30-minute lunch period. In addition, employees working on production lines—approximately 1,600, or approximately 50 percent of the employees on the first two shifts— have a 5-minute washup period before their lunch break and two 22-minute rest periods.

The following table[3] is a representative showing of patronage of cafeteria and vending machine services during the indicated weeks:

Week	Customer Count in all Cafeterias	Customer Count in Hourly Cafeteria	Total Plant Population	Vending Sales Unit
1. 10/12/75 through 10/18/75	6,745	5,600	4,445	96,279
2. 11/15/75 through 11/21/75	3,938	3,865	3,755	61,568
3. 1/10/76 through 1/16/76	3,947	3,873	3,750	70,560
4. 2/28/76 through 3/ 5/76	875	820	3,950	16,741

3. Page 29 of the transcript is hereby corrected to conform with the statistical data in the table. The record is also corrected to reflect the changes indicated at page 5, note 5, of the General Counsel's brief.

In the vicinity of Chicago Heights and within several miles from Respondent's plant, are more than a dozen other industrial plants employing several thousand employees. There are five short-order eating places and five sit-down restaurants within 3 miles of the plant, and some 25 establishments within 4 miles. Respondent agrees that it is not feasible, presumably because of time limitations,[4] for employees to leave the plant during their 22-minute rest breaks, and, as indicated above, their lunch period is only 8 minutes longer. Mobile food vending trucks are not permitted on plant property, and are not usually available outside the plant gate. Comparatively few employees actually leave the plant during lunch periods.

Employees are permitted to bring their own food into the plant which they may store only in their personal lockers and not in working areas. Food may only be eaten in the cafeterias or in break areas or coke cribs. The locker rooms are ventilated but not air-conditioned and employees have no facilities for refrigerating food they bring in. According to Local 588's president, Richard Marco, the locker rooms are not well ventilated and become "very hot and sticky and smelly" in summer months when area temperatures frequently range between 80 and 100 degrees and go even higher. Marco further testified to having received employee complaints concerning food spoilage resulting from locker room conditions.[5] And Respondent has had occasion to use exterminator services upon complaints from employees as to sanitary conditions in the locker room.

Respondent-Union relationship as to in-plant food services

Respondent and International UAW have had a series of collective-bargaining agreements covering plant employees since

4. Moreover, employees may not leave the plant without permission during their 22-minute breaks.

5. Marco while testifying on August 16, 1976, said that he received the last such complaint in May 1976.

approximately 1956 when the International was certified as their statutory bargaining representative. These have actually been national agreements, and the national contract at material times here was effective from November 1973 until September 1976. Pursuant to practice, Local 588 and Respondent have also negotiated a series of local agreements concerning local issues, and the last such agreement ran from June 1974 until September 1976.

Neither the 1973 International Agreement nor the 1974 Local Agreement contains any provision regarding cafeteria or vending machine prices. (During negotiations for the 1974 Local Agreement, Respondent had rejected Local 588's request that it bargain about in-plant food prices.) Respondent has meanwhile recognized "its continuing responsibility for the satisfactory performance of the caterer and for providing the Union with a means for registering and expeditious handling of complaints concerned with such performance." This "recognition" appears as the last paragraph in the following letter of understanding, dated October 29, 1967, from Respondent to Local 588, this letter being included in the parties' 1970 Local Agreement (Jnt. Exh. 8, pp. 5-6):

Improved Vending and Cafeteria Service

This is to advise that in accordance with our discussion during 1967 local negotiations, a meeting was held between representatives of the Company and Al Green Enterprises, Inc. for the purpose of improving cafeteria and vending services.

It was agreed there will be a reassignment of serving and kitchen duties to ensure additional personnel for the serving of steam table items at all times during regular lunch periods.

Additionally, assurance was given that the Cafeteria Manager or an Assistant Manager, during all lunch periods, will be stationed in the cafeteria to ensure the adequacy of food, service, condiments, silverware and utensils.

Silverware will be subjected to continuing additional inspection after washing, and in the event of a temporary

shortage of personnel due to absenteeism, etc., a standby supply of clean silverware will be available to ensure an adequate supply during all feeding periods.

To provide condiments for sandwiches dispensed in the "Coke Cribs," dispensers of mustard and catsup will be installed.

It was further agreed that Al Green Enterprises, Inc. will without undue delay following the strike provide a qualified expert from its home office to study local conditions for the purpose of providing attractive "weekly specials," more varied menus and to devise means for improving cashier service.

Additionally, a vending service specialist will study the plant's vending requirements and facilities, including the added milk, pastry and ice cream machines for the purpose of recommending an improved servicing schedule and any additional manpower necessary to implement such schedules. Each vending crib will be serviced at least once a shift.

To ensure that vending machines will be given prompt servicing in the event of mechanical breakdown, an instant means of communication with the mechanic will be provided.

The Local Agreement of 1970 also contains two other communications from Respondent to Local 588. The first, dated November 15, 1964, reads (Jnt. Exh. 8, p. 40):

Supplemental Eating Facilities

This is to advise that in accordance with our discussions during 1974 local negotiations, the Company intends to install a permanent type eating facility equipped with vending machines in the new addition to serve those employees working in the new addition and the shipping dock.

And the second, dated December 11, 1970, states (Jnt. Exh. 8, p. 7):

Shipping Dock Cafeteria Hours

Following the conclusion of 1970 local negotiations, the Company will arrange for the Shipping Dock Cafeteria to be open on all shifts, at the same times that the main cafeteria is open.

The 1974 Local Agreement contains a letter of understanding from Respondent to Local 588, stating in relevant part that "as discussed in 1973 local negotiations," "The five (5) employee break areas [which I presume are the aforementioned "coke cribs"] will be enclosed and air-conditioned with an adequate number of window type air-conditioning units" (Jnt. Exh. 7, p. 2). In their Local Agreement of 1974 the parties also agreed as follows, concerning "Vending and Cafeteria Service" Jnt. Exh. 7, p. 5):

> 1. CAFETERIA SERVICE
>
> The Company assures the Union that steam table items will be available at all times during the regular lunch period and that a comparable selection of entrees, salads and desserts will be available during all regular lunch periods. In addition, the Company will make arrangements for a delicatessen type sandwich service in the cafeteria. Cafeteria supervision will be available during all lunch periods to ensure that employees will be served in a reasonable length of time through the main serving lines as well as to provide for the adequacy of food service, condiments and utensils.
>
> 2. VENDING SERVICE AND VARIETY
>
> To assure that vending machines will receive prompt servicing in the event of a mechanical breakdown, a sticker will be affixed to each machine indicating the number to call for repair. Further, the Company assures the Union that a greater variety of selections will be maintained in the existing vending machines and that the quality of such items will continue to meet Company standards.
>
> The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.

The 1970 and 1974 Local Agreements also show that the parties have discussed and that Respondent has agreed on various items of plant maintenance, including the inspection and improvement

of ventilation systems affecting, among others, the plant locker room (Jnt. Exh. 7, pp. 3-4; Jnt. Exh. 8, p. 4).

The current dispute

On or about February 6, 1976, Respondent informed Local 588 that ARA would be increasing the prices of certain cafeteria and vending items, effective February 9, 1976. Local 588 had not been previously advised of the increases, and Respondent did not furnish specific information on February 6 about the amount of the increases. Local 588 requested at the time that the increases be postponed until Local 588 could discuss the matter with Respondent, but Respondent refused. The increases went into effect on February 9; most affected items were raised 5 cents and some were raised 10 cents. By letter dated February 13, 1976, Local 588 asked Respondent to bargain concerning "prices and services in cafeteria and vending operations," and Respondent again declined on February 19 for the stated reason that "food prices and services are not a proper subject for negotiations."

By letter to Respondent on March 23, 1976, Local 588 requested certain information concerning Respondent's role in cafeteria and vending operations in order, the letter stated, to administer existing collective-bargaining provisions (the June 20, 1974, agreement set forth above) and to prepare for upcoming negotiations in September 1976 when, by their terms, the national and local agreements between Respondent and the Union would expire. Local 588 thus sought, among other things, information as to Respondent's maintenance responsibilities, Respondent's profits from the food operations, Respondent's control of prices, and Respondent's contractual arrangement with any food supplier. On April 9, 1976, Respondent turned down Local 588's request for information and again refused, and it has continued to refuse, to bargain about cafeteria and vending prices.

Meanwhile, on February 16, 1976, Local 588 began a boycott of the food services operations. "Substantially in excess of half of the members of Local 588" observed the boycott, according to the parties' stipulation, and most of these observing employees brought in their lunches during the period. Local President Marco testified that a few employees left the plant to eat and that some employees did not eat at all. The boycott did not cause any price reductions, with the possible exception that some special dishes were made available. The cafeteria boycott was ended by Local 588's Shop Committee on May 19, 1976, and the boycott of vending machines was terminated on June 7, 1976. Contributing to this decision to call off the boycott, according to President Marco, was the onset of hot weather with consequent problems of spoilage of food the employees brought into the plant. It may be fairly said, however, and I find that a substantial reason for abandoning the boycott was its ineffectiveness in reducing prices.

In July 1976, the International notified Respondent of its desire to terminate their current national contract and all local agreements. While not in this record, the news media report that Respondent and the International have concluded negotiations for a new contract. However, no party has requested that the results of these latest negotiations be made part of this record, and nothing further need be said in that regard.

Does the Act require Respondent to bargain concerning the prices of in-plant food?

Board and Court Decisions

By a divided vote (3-2) in *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), the Board held that an employer in an urban industrial setting is required under the Act to bargain with a statutory representative of its plant employees concerning food prices charged in on-site cafeterias. The in-plant cafeteria facilities were operated by a catering service pursuant to contract

with Westinghouse; under the contract, the caterer paid Westinghouse a rental of $1.00 a year and Westinghouse provided the capital equipment necessary for operating the facilities. The catering contract also provided, among other things, that the "quantity and prices of the meals served, and the hours of service thereof . . . shall at all times be reasonable" and it also gave Westinghouse a right to conduct periodic audits of the cafeteria accounts. The caterer announced an increase in the price of a food item and the union involved sought to meet and discuss the matter with Westinghouse. Westinghouse refused the union's request, and the Board concluded in finding a violation of Section 8(a)(5) that it is "within the objective and meaning of the Act to require parties to submit such controversies to the healing processes of collective bargaining" (156 NLRB at 1082).

On review of the *Westinghouse* case, a divided Court of Appeals, sitting en banc, reversed the Board and held that the in-plant food prices were not a mandatory subject of bargaining. *Westinghouse Electric Corporation* v. *N. L. R. B.*, 387 F. 2d 542 (C. A. 4, 1967). The Court stated in part that "The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider vital. *Nor is there any evidence that the inclusion of this issue here within the collective bargaining framework is a widespread industrial practice*" (387 F. 2d at 548, emphasis added).[6]

In *McCall Corporation*, 172 NLRB 540 (1968), employees were able to purchase food "in a company-owned and -operated cafeteria" and "out of vending machines owned by a contractor but supplied with company cafeteria-prepared and -priced food" (172 NLRB at 541). There were some 16 unions in the plant, and McCall refused to negotiate with one of them concerning food prices. Citing its *Westinghouse* case, *supra*, and an earlier *Weyerhaeuser* case (87 NLRB 672) involving a sawmill and lumber camp setting, a Board panel concluded that food prices

6. Nor was such evidence offered in the present case.

"constitute 'conditions of employment' and bargainable matters" and that McCall violated Section 8(a)(5) by refusing to bargain over such prices. By divided vote on review, the Fourth Circuit found that "the difference between the indirect control exercised in *Westinghouse* and the direct control in *McCall* over the quality and prices of food is not of sufficient significance to affect the result." *McCall Corporation* v. *N. L. R. B.*, 432 F. 2d 187, 188 (1970). The Court rejected the Board's request that the Court overrule its *Westinghouse* ruling and it set aside the Board's *McCall* decision.

The next in this series of cases cited by the parties is *Package Machinery Company*, 191 NLRB 268 (1971), reversed 457 F. 2d 936 (C. A. 1, 1972). The company in this case had a contract with a caterer to operate in-plant cafeteria and vending machine services, and under their arrangement the company paid a specific monthly subsidy to the caterer. The union involved requested that the company furnish it a copy of the company's contract with the caterer and that the company bargain with it concerning food and beverage prices. The company refused, and a Board panel found a violation of Section 8(a)(5) upon the basis of its *Westinghouse* and *McCall* decisions. Referring to the aforementioned Court decision in *Westinghouse*, the First Circuit set aside the Board's *Package Machinery* order and observed, *inter alia*, that "If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages . . . ." (457 F. 2d at 938).[7]

Finally we come to *Ladish Co.*, 219 NLRB 354 (1975), where, as the General Counsel mentions, the Board undertook a "thorough examination" of the issue presented here (G. C. Br., p. 15). The employer in that case made hot and cold food available to its employees through contracts with vending machine companies (caterers). The caterers determined the

7. The 1973 contract between Respondent and the Union included wage increases as well as a cost-of-living allowance geared to the Combined Consumer Price Index (Jnt. Exh. 4, pp. 96-97).

prices of food items and the employer received from the caterer a commission on food sales to cover the use of floor space, overhead, and operational costs. Employees received a 15-minute paid lunch period and were not permitted to leave the plant for lunch. About 70 percent of the employees purchased their lunches from vending machines, 90 percent obtain beverages from the machines, and the other employees bring their lunches. One of several involved unions filed a grievance protesting an increase in all food items, and the employer's response was to refuse to negotiate. In a full-dress discussion of the issue, as indicated above, a Board panel (with one dissent and one concurrence) concluded that in-plant food prices "constitute 'conditions of employment' and bargainable matters" (219 NLRB at 358), and it directed the employer to bargain concerning those matters.

The Board brought enforcement proceedings before the Seventh Circuit in the *Ladish* case. Denying enforcement and in effect joining the First and Fourth Circuits, the Court held that "vending machine food prices are not a material or significant condition of employment at Ladish. The impact of these prices is too remote to require bargaining." *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267, 1272 (C. A. 7, 1976).

The Board did not file a petition for certiorari in *Ladish*.

Discussion

The facts of the present case fall within the factual-legal contexts of the *Westinghouse, McCall, Package Machinery*, and *Ladish* cases. It is unnecessary, in my opinion, to have discussed these cases in greater detail for it is beyond question that in-plant food prices are a mandatory subject of bargaining on the basis of the mentioned Board decisions. It seems equally clear that such prices are not a required subject of bargaining if the mentioned court decisions be controlling. The present case is therefore not one that requires in-depth analyses of the cases and of underlying theory.

Administrative Law Judges are bound by Board decisional law, needless to say, despite reversals on the same point of law by Courts of Appeals. The question I have, however, is what interpretation to accord the Board's determination not to seek certiorari in the *Ladish* case. Complicating the problem is the fact that such determination might have been influenced by the lack of a conflict between the Circuits and the Board's awareness of the difficulty of obtaining Supreme Court review without a conflict. In other words, it is possible that the Board may still be desirous of testing the issue in other Courts of Appeals before giving up on the issue or before seeking certiorari without a conflict.

With less certainty than I would like, I nonetheless conclude that the action of the Board in not seeking certiorari in the *Ladish* case is more significant than might generally be the situation. When the Board decided the *Ladish* case, it had been reversed by the First and Fourth Circuits, and its decision in the *Ladish* case represented a "thorough examination" of the issue and was, in fact, a major decisional effort. On its facts the case was a strong one, in my opinion, for presenting the Board's position on the issue.[8] Having made this major effort and lost again and then determining not to seek certiorari in the *Ladish* circumstances, the Board has now decided to hold—at least I so interpret its action—that in-plant food prices are not a mandatory subject of bargaining. I thus conclude that Respondent did not violate the Act by refusing to bargain about such prices and that it also did not violate the Act by refusing to furnish information in such connection. Nor is this result affected by the fact that Respondent has bargained with Local 588 concerning other (non-price) aspects of its in-plant food facilities. *N. L. R. B.* v. *Ladish Co.*, 538 F. 2d at 1272.[9]

8. It is noted that in its Brief (p. 16) filed with the Court in the *Ladish* case, the Board urged that the facts therein "are stronger" than in the *Westinghouse, McCall,* and *Package Machinery* cases.

9. In view of these conclusions, it is unnecessary to consider Respondent's "zipper-clause" contention.

I shall accordingly recommend that the complaint be dismissed.

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.

2. The Union is a labor organization within Section 2(5) of the Act.

3. Respondent has not engaged in the violations of Section 8(a)(1) and (5) alleged in the complaint.

Upon the foregoing, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

It is ordered that the complaint be dismissed.

Dated at Washington, D. C.

/s/ RALPH WINKLER
Ralph Winkler
Administrative Law Judge

10. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 23, 1978

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

FORD MOTOR CO. (CHICAGO STAMPING PLANT), *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent,* and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *Intervenor.*	No. 77-1707 — On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by petitioner, Ford Motor Company, no judge in active service has requested a vote thereon, and all of the judges of the original panel have voted to deny a rehearing, Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT), *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, and LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *Intervenor.*	No. 77-1707

JUDGMENT

Before: SWYGERT and SPRECHER, *Circuit Judges* and GRANT, *Senior District Judge.**

THIS CAUSE came on to be heard upon the petition of Ford Motor Company (Chicago Stamping Plant), to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors and assigns and upon the Board's cross-application for enforcement of said order. The Court heard argument of respective counsel on January 10, 1978, and has considered the briefs and transcript of the record filed in this cause. On February 22, 1977, the Court being fully advised in the premises handed down its opinion denying the

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Ford Motor Company (Chicago Stamping Plant), its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

/s/ ROBERT A. SPRECHER
Judge, United States Court of Appeals for the Seventh Circuit

APPENDIX E

Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (61 Stat. 140-3, as amended, 29 U. S. C. 158) provide in pertinent part:

"(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1978
CERTIORARI GRANTED OCTOBER 10, 1978

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-15340

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT)

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America (herein called Local 588) that Ford Motor Company (Chicago Stamping Plant) (herein called Respondent), has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), by the undersigned Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The charge herein was filed by Local 588 on April 12, 1976, and was served on Respondent, by registered mail, on April 14, 1976.

II

(a) Respondent is, and has been at all times material herein, a Delaware corporation.

(b) Respondent, at all times material herein, has maintained an office and place of business at 1000 East Lincoln Highway, Chicago Heights, Illinois (herein also called Respondent's facility) where it is engaged in the manufacture and distribution of automobiles and automobile parts.

(c) During the past calendar year, a representative period, Respondent, in the course and conduct of its business operations described above in subparagraph (b) of this paragraph, manufactured and distributed at its facility products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said facility to points located outside the State of Illinois.

(d) During the past calendar year, a representative period, Respondent, in the course and conduct of its business operations described above in subparagraph (b) of this paragraph, purchased and caused to be transported and delivered to its facility, goods and materials, valued in excess of $50,000, directly from points outside the State of Illinois.

(e) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III

Local 588 is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

IV

At all times material herein, the following named persons have occupied the positions set opposite their respective names, and have been, and are now, agents of Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act, and supervisors within the meaning of Section 2(11) of the Act:

Thomas Brown—Industrial Relations Manager

Richard L. Smith—Supervisor of Hourly Personnel and Labor Relations

Harry Androsko—Employee Services Manager

Robert Jaranowski—Senior Labor Relations Representative

Lou Cecchini—Labor Relations Representative

Barrett Whitcomb—Labor Relations Representative

Shelly Bates—Labor Relations Representative

V

All production and maintenance employees in the Respondent's facility described above in paragraph II(b), but excluding general office employees and clerical employees other than shipping and receiving clerks, employees in the Industrial Relations and methods and work standards department, employees engaged in designing, drafting, laboratory, photo-

graphic and other technical, experimental and/or research work, cafeteria and dining room employees, plant protection and fire department employees, guards, professional employees, foremen, trainee foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.

VI

On or about August 17, 1956, a majority of the employees in the unit described above in paragraph V, by secret ballot election in Case No. 13-RC-5122, designated and selected International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (hereinafter referred to as the International UAW) as their exclusive representative for the purpose of collective bargaining with Respondent, and on August 27, 1956, the Regional Director for the Thirteenth Region certified the International UAW as the exclusive bargaining representative of the employees in the unit described above in paragraph V.

VII

At all times since August 17, 1956, and by virtue of the Certification of Representative issued in Case No. 13-RC-5122, the International UAW has been the designated and selected representative for the purpose of collective bargaining of all the employees in the unit described above in paragraph V, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

VIII

Since in or about 1956, Local 588 has negotiated successive local contracts with respect to topics specifically delegated to the local unions by agreement of the International UAW and Respondent, or items specified in the collective bargaining agreement between International UAW and Respondent which give local negotiators a choice of options, or items which through the parties collective bargaining history have been subject to local negotiations.

IX

(a) On or about October 31, 1973, Respondent and the International UAW entered into a collective bargaining agreement with an effective date of November 19, 1973 and a termination date of September 14, 1976.

(b) On or about June 19, 1974, Respondent entered into a local agreement with Local 588 regarding local conditions relating to the employees in the unit described above in paragraph V, and said agreement has an effective date of June 20, 1974 and a termination date of September 14, 1976.

(c) At all times material herein, Local 588 has requested and is requesting Respondent to bargain collectively with respect to local terms and conditions of employment as the exclusive representative of all employees in the unit described above in paragraph V.

(d) Commencing on or about February 18, 1976, and continuing to date, Respondent did refuse, and continues to refuse, to bargain collectively with Local

588 as the exclusive bargaining representative of the employees in the unit described above in paragraph V, in that on or about February 18, 1976, and continuing to date, Respondent refused to negotiate with Local 588 representatives with regard to prices and services of food provided for sale to employees in the unit described above in paragraph V through cafeteria and vending operations at Respondent's facility.

(e) Commencing on or about April 9, 1976, and continuing to date, Respondent did refuse, and continues to refuse, to bargain collectively with Local 588 as the exclusive bargaining representative of the employees in the unit described above in paragraph V, in that on or about April 9, 1976, and continuing to date, Respondent has failed and/or refused to provide Local 588 with information necessary for contractual administration and negotiations with regard to prices and services of food provided for sale to employees in the unit described above in paragraph V through cafeteria and vending operations at Respondent's facility.

X

By the acts and conduct described above in paragraphs IX(d) and IX(e), and by each of said acts, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and 8(a)(1) and Sections 2(6) and 2(7) of the Act.

PLEASE TAKE NOTICE that on the 16th day of August 1976, at 11:00 a.m. in Room 881, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, a hearing will be conducted before a duly designated Administrative Law

Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as an agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

DATED at Chicago, Illinois, this 26th day of May, 1976.

/s/ Alex V. Barbour
ALEX V. BARBOUR
Regional Director
National Labor Relations Board
Thirteenth Region
Room 881
Everett McKinley Dirksen Bldg.
219 South Dearborn Street
Chicago, Illinois 60604

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-15340

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT)

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

ANSWER TO COMPLAINT

Now comes Ford Motor Company (hereinafter referred to as "Respondent") and in answer to the Complaint states as follows:

Paragraphs I-III

Respondent admits the allegations in Paragraphs I-III.

Paragraph IV

Respondent admits the allegations in Paragraph IV of the Complaint except that Mr. L. Cecchini was Industrial Relations Manager at the Respondent's Chicago Heights, Illinois Stamping Plant until October 1975 and Mr. T. Brown has been Industrial Relations Manager at the Respondent's Chicago Heights Stamping Plant since that date. Mr. Harry Andrasco is Employee Services Supervisor. Mr. Shelly Bates is Salaried Personnel Supervisor and

Mr. B. Whitcomb terminated his employment with the Respondent in April 1975.

Paragraphs V-VII

Respondent admits the allegations in Paragraphs V-VII.

Paragraph VIII

Respondent admits the allegations in Paragraph VIII concerning local agreements with respect to certain items specified in the agreement between the International Union and Respondent, but further answering avers that Local 588 had and has no status in connection with such agreements other than as a subordinate administrative component of the International Union which continues to be the exclusive statutory representative of the hourly rated employees at Respondent's Chicago Heights, Illinois Plant, described in Paragraph V of the Complaint.

Paragraph IX

(a) Respondent admits the allegations of Subparagraph (a).

(b) With respect to Subparagraph (b), Respondent admits the existence of the local agreement, pursuant to the 1973 collective bargaining agreement, regarding certain local conditions at the Chicago Heights Stamping Plant relating to the employees in the unit described in Paragraph V of the Government's Complaint. Respondent further admits that the local agreement has an effective date of June 20, 1974 and a termination date of September 14, 1976. However, Respondent further avers that Local

588 had and has no status in connection with such agreements other than as a subordinate administrative component of the International Union which continues to be the exclusive statutory representative of the employees at Respondent's Chicago Heights Plant, described in Paragraph V of the Complaint.

(c) With respect to Subparagraph (c), Respondent admits the request from the Local Union to bargain collectively with respect to local terms and conditions of employment at the Chicago Heights Stamping Plant but reiterates that Local 588 had and has no status with respect to such bargaining other than as a subordinate administrative component of the International Union, which continues to be the exclusive statutory representative of the hourly rated employees at Respondent's Chicago Heights Plant.

(d) With respect to Subparagraph (d), Respondent admits that it did refuse and continues to refuse to bargain collectively with the International Union or with Local 588, as a subordinate administrative component of the International Union, with regard to prices and services of food provided for sale to hourly rated employees, in the unit described in Paragraph V of the Complaint, through cafeteria and vending operations at Respondent's facility, and, further answering avers that it had no duty under the Act to bargain with respect to such matters; and further answering avers that the Company and the International Union have agreed in Article X, Section 10, of the 1973 collective bargaining agreement that neither shall be obligated to bargain collectively with respect to any subject or matter referred to or covered in the agreement or to any subject or matter

not specifically referred to or covered in the 1973 collective bargaining agreement.

(e) With respect to Subparagraph (e) of the Complaint, Respondent admits that it has refused to provide the International Union with information with regard to prices of food provided for sale to employees in the unit described in Paragraph V of the Complaint to cafeteria and vending operations at Respondent's Chicago Heights facility, but for the reasons stated in Subparagraph (d) immediately above avers that it had no duty to provide such information or to bargain collectively with respect thereto.

Paragraph X

Respondent denies that the actions complained of were improper or constituted unfair labor practices within the meaning of the cited Sections of the Act.

Joseph A. O'Reilly
William J. Rooney
Attorneys for Ford Motor Company

By /s/ William J. Rooney
WILLIAM J. ROONEY
The American Road—Room 1021
Dearborn, Michigan 48121
(313) 322-1363

Dated: June 4, 1976

OFFICIAL REPORT OF PROCEEDINGS

* * * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-15340

IN THE MATTER OF:

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT)

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

* * * *

Monday, August 16, 1976

Pursuant to notice, the above-entitled matter came on for hearing at 11:00 o'clock a.m.

* * * *

[3] PROCEEDINGS

ADMINISTRATIVE LAW JUDGE WINKLER:

The hearing will come to order.

This is a hearing before the National Labor Relations Board in the matter of Ford Motor Company, Case No. 13-CA-15430.

My name is Ralph Winkler.

Will Counsel and other representatives of the parties please state their appearances for the record?

MR. DUBE: For the General Counsel, Lawrence E. Dube.

MR. ZIEGLER: And Frank J. Ziegler.

JUDGE WINKLER: For Respondent?

MR. SCHUR: For the Charging Party, Jerome Schur of the law firm of Katz & Friedman, Seven South Dearborn Street, Chicago, Illinois.

JUDGE WINKLER: For Respondent?

MR. ROONEY: For the Respondent, Ford Motor Company, William J. Rooney, Office of the General Counsel, Ford Motor Company, the American Road, Dearborn, Michigan.

JUDGE WINKLER: General Counsel, please proceed.

MR. DUBE: Your Honor, at this point I offer the formal papers, General Counsel's Exhibit 1(a) through 1(f), 1(f) being an index and description of the formal papers. The exhibit has been shown to both the Charging Party and Respondent.

[4] JUDGE WINKLER: Received.

(The documents heretofore marked General Counsel's Exhibit No. 1(a) through 1(f) for identification, were received in evidence.)

JUDGE WINKLER: I take it that—I am familiar with the Pleadings in the case—that the principal issue we have here is whether bargaining about the food, et cetera, was a mandatory subject of bargaining. Is that the issue we have?

MR. ROONEY: That is the main issue. There is also an issue—

JUDGE WINKLER: We have a subsidiary zipper clause issue?

MR. ROONEY: Yes.

MR. DUBE: Based on some off-the-record discussions this morning, the parties are willing to stipulate to a substantial amount of factual data relating to the issues in this case, and what I would propose is that we begin reading those stipulations that have been achieved so far into the record and start putting exhibits in as Joint Exhibits.

JUDGE WINKLER: You are at bat.

MR. DUBE: Pardon me?

JUDGE WINKLER: You are at bat.

MR. DUBE: Okay. The first stipulation: Employees at the facility of Respondent involved in this proceeding, Chicago Stamping Plant, are engaged in stamping automotive parts for shipment to Respondent's assembly plants located [5] throughout the United States. There are currently approximately 3600 employees in the bargaining unit, which is described in Paragraph 5 of the Complaint.

Mark this as Joint Exhibit 1.

(The document referred to was marked Joint Exhibit No. 1 for identification.)

MR. DUBE: Joint Exhibit 1 is a list of the number of bargaining unit employees shown in six separate years with the figures being a yearly average of employees in the unit.

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: Let's go on the record.

Thus far we are—all parties are stipulating that Joint Exhibit 1 come in, is that correct?

MR. ROONEY: Yes, sir.

JUDGE WINKLER: All right. Received.

(The document heretofore marked Joint Exhibit No. 1 for identification, was received in evidence.)

MR. DUBE: Further we proposed to stipulate the Chicago Stamping plant is located in Chicago Heights, Illinois, approximately ten miles south of Chicago. The population of Chicago Heights is approximately 40,900. The population of East Chicago Heights is approximately 6,400. There are more than a dozen industrial plants to the north and west of the [6] Chicago Stamping Plant, located within several miles of the Chicago Stamping Plant, employing a total of several thousand persons.

Mark this as Joint Exhibit 2.

(The document referred to was marked Joint Exhibit No. 2 for identification.)

MR. DUBE: I propose to stipulate that the document which has been marked as Joint Exhibit 2 is a true and accurate copy of the map of the area in which the Chicago Stamping Plant is located. The scale of miles affixed to the exhibit accurately portrays the scale of the map. The depiction of the Chicago Stamping Plant on the map is a depiction of the plant only and is not a scale depiction of the plant. The point marked as X on Joint Exhibit 2 accurately locates the location of the junction between Cottage Grove Avenue and the sole driveway authorized for use during lunch or meal periods by bargaining unit employees leaving, leaving or entering, the plant premises by vehicle or foot.

Based on the stipulation, I would offer Exhibit 2.

MR. ROONEY: No objections.

MR. SCHUR: No objection.

JUDGE WINKLER: All right. Received.

(The document heretofore marked Joint Exhibit No. 2 for identification, was received in evidence.)

MR. DUBE: I further propose to stipulate Respondent [7] operates three shifts at the Chicago Stamping Plant. The day shift begins at 7 a.m. and ends at 3:30 p.m.; the afternoon, also referred to as evening, shift begins work at 4 p.m. and ends at 12:30 a.m.; the night, also referred to as midnight, shift begins work at 12 midnight and ends at 8:30 a.m. The day and evening shifts are operating production shifts. Each production shift employes approximately 1500 to 1600 bargaining unit employees. The night shift is engaged in set-up and maintenance work and employes approximately 500 bargaining unit employees. A small number of skilled employees included in the bargaining unit begin work shortly before or after the shift starting times just described.

Mark this as Joint Exhibit 3.

(The document referred to was marked Joint Exhibit No. 3 for identification.)

MR. DUBE: I propose a stipulation that the document marked Joint Exhibit 3, purporting to be a bus schedule for the South Suburban Safeway Lines, is a true and accurate representation of bus service as listed on the schedule. I would offer Joint Exhibit 3.

MR. ROONEY: Without objection.

MR. SCHUR: Agreed.

JUDGE WINKLER: Received.

[8] (The document heretofore marked Joint Exhibit No. 3 for identification, was received in evidence.)

MR. DUBE: I further proposed a stipulation that bargaining unit employees are permitted a 30-minute lunch or meal period once during each shift worked. On each shift unit employees are scheduled for meals during one of the following period: First the day shift: 11 a.m. to 11:30 a.m., 11:45 a.m. to 12:15 p.m., 12:30 p.m. to 1 p.m.; the evening shift: 7:30 p.m. to 8 p.m., 8:15 p.m. to 8:45 p.m., 9 p.m. to 9:30 p.m.; the night shift: 3:15 a.m. to 3:45 a.m., 4 a.m. to 4:30 a.m.

Mark these as Joint Exhibit 4.

(The document referred to was marked Joint Exhibit No. 4 for identification.)

MR. DUBE: I further propose to stipulate that in addition to the 30-minute lunch period, unit employees who work directly on production lines on the day and evening shifts are entitled to a five-minute washup period prior to commencement of the meal period. Approximately 50 percent of the employees on those shifts are so situated. The direct production line employees described just previously are also permitted two 22-minute rest periods on each shift worked.

Joint Exhibit 4 is a true and accurate copy of the collective bargaining agreement dated October 31, 1973, effect- [9] ive November 19, 1973, between Ford Motor Company and the United Auto Workers, and I would offer Joint Exhibit 4.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 4 for identification, was received in evidence.)

MR. DUBE: Joint Exhibit 4 contains on Page 198, in Article 4, Section 4(a) limitations on the scheduling of rest periods.

JUDGE WINKLER: That is the only reason for which this document is being offered?

MR. ROONEY: No.

MR. DUBE: No.

JUDGE WINKLER: What else is it being offered for?

MR. ROONEY: For the zipper clause.

JUDGE WINKLER: Okay. Let me just say this: With respect to, you know, large documents that might contain matters extraneous to what we have here, it will be incumbent upon each of the parties to indicate precisely what you are relying on. You needn't do it now, but before the hearing closes you can do it, you will do it. And I will be understanding of the respective problems of respective parties.

MR. DUBE: Mark this as Joint Exhibit 5.

(The document referred to was marked Joint Exhibit No. 5 for identification.)

[10] MR. DUBE: I propose to stipulate the document which has been marked for identification as Joint Exhibit 5 is a true and accurate representation of the location and arrangement of the Chicago Stamping Plant. Distances in proportion on the exhibit are shown to approximate but not exact scale. The total area depicted by the exhibit is approximately one-half mile in length and one-half mile in width. Plant buildings depicted occupy an area approximately one-quarter mile in length and one-quarter mile in width. I would also note for the

record that there are some—there is a legend at the lower left-hand corner of the exhibit which is not being offered as part of the exhibit. It is color-coded.

JUDGE WINKLER: What about these numbers and letters on the exhibit?

MR. DUBE: We will get into those.

JUDGE WINKLER: All right.

Off the record.

(Discussion off the record.)

JUDGE WINKLER: Joint Exhibit 5 is received.

(The document heretofore marked Joint Exhibit No. 5 for identification, was received in evidence.)

MR. DUBE: I propose a further stipulation that bargaining unit employees on all shifts work in various locations throughout the plant. The only air-conditioned plant areas [11] either working or non-working which unit employees regularly enter are the cafeterias and coke cribs. Each bargaining unit employee is provided a locker. With the exception of approximately two dozen employees who have additional lockers located elsewhere in the plant, all lockers are located along the mezzanine. The mezzanine is reached from ground level by means of five inside stairways indicated on Joint Exhibit 5 by notation of the letters A, B, C, D and E.

(Discussion off the record.)

MR. DUBE: I would propose to further stipulate that the mezzanine referred to is a second-floor area in the plant which runs on Joint Exhibit 5 approxi-

mately from the letter A to a notation marked on Joint Exhibit 5 as F.

JUDGE WINKLER: Off the record.

(Discussion off the record.)

MR. DUBE: The Chicago Stamping Plant maintains three in-plant dining rooms, the Executive dining room, salaried cafeteria, and hourly cafeteria. Bargaining unit employees are permitted to use only the hourly cafeteria. The hourly cafeteria is located on the second floor of the plant mezzanine and is open only from 5 a.m. to 8 a.m. for breakfast and during the regularly scheduled lunch or meal periods. The hourly cafeteria is equipped with seats and tables, and has a seating capacity of 400 to 500. Three serving lines are operated in the hourly cafeteria. Two lines pass by [12] steam tables and offer hot meals and beverages. The third line offers a limited menue of hotdogs, sandwiches and beverages.

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: On the record.

MR. DUBE: I would further propose to stipulate that the hourly cafeteria is open during shift change periods but that no food is served or available in the hourly cafeteria except from vending machines located therein.

JUDGE WINKLER: All right.

MR. ROONEY: Agreed.

MR. DUBE: The unit employees bringing food or beverages into the stamping plant are required to store such items in their personal lockers. Employees are not permitted to eat or drink except in

the plant cafeterias and coke cribs. Employees are not permitted to carry food or beverages or personal clothing not required for work into working areas of the plant. There is no refrigeration equipment in the locker area or anywhere else in the plant available for unit employees to refrigerate food or beverage items.

Would you mark these as Joint Exhibit 6?

(The document referred to was marked Joint Exhibit No. 6 for identification.)

MR. DUBE: I propose to stipulate a document which has [13] been marked for identification as Joint Exhibit 6 is a true and accurate copy of the collective bargaining agreement between Ford Motor Company and the United Auto Workers, dated December 7, 1970, and I would offer Joint Exhibit 6.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 6 for identification, was received in evidence.)

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: Let's continue.

MR. DUBE: Would you mark these as Joint Exhibits 7 and 8?

(The documents referred to were marked Joint Exhibits Nos. 7 and 8 for identification.)

MR. DUBE: I propose to stipulate that Joint Exhibit 7, a document that has been marked for identification, is a true and accurate copy of the

collective bargaining agreement between Local Union No. 588, United Auto Workers, and Ford Stamping Plant, effective June 20, 1974. I would—

VOICE: I wouldn't stipulate to that.

JUDGE WINKLER: Would you stipulate the document is what it purports to be?

VOICE: It's a local agreement, printed by the Local.

JUDGE WINKLER: Off the record.

[14] (Discussion off the record.)

JUDGE WINKLER: On the record.

Let the record show that we are receiving Joint Exhibit 7 as a document, the parties further agree, is what it purports to be, and with the understanding that should any of the parties discover some inaccuracies that might be relevant and material to this case, they will call it to opposing Counsel's attention and a proper stipulation will then be entered into and made a part of the record in this case. All right?

MR. ROONEY: Agreed.

MR. SCHUR: Agreed.

MR. DUBE: All right.

JUDGE WINKLER: 7 is received.

(The document heretofore marked Joint Exhibit No. 7 for identification, was received in evidence.)

MR. DUBE: I propose to stipulate that a document marked Joint Exhibit 8 is a collective bargaining agreement between Local 588, United Auto Workers, and the Ford Stamping Plant, Chicago Heights, Illinois, effective December 11, 1970.

MR. ROONEY: Same stipulation.

JUDGE WINKLER: All right. 8 is received with the same reservation indicated with respect to Joint Exhibit 7.

(The document heretofore marked Joint Exhibit No. 8 for identi- [15] fication, was received in evidence.)

MR DUBE: I would propose to stipulate that in Joint Exhibits 7 and 8 where particular agreements contained therein have a date earlier than the effective date of the contract that the dates set forth in the particular agreement reflect the date of initial agreement thereto.

JUDGE WINKLER: I don't understand that.

MR. DUBE: Some of the—in those books, which have effective dates on the cover, some of the individual agreements have dates three, six, nine years earlier typed in, and this is just to clarify the record to show that where those dates are shown, that date shown on the individual page represents the date of initial agreement on that issue.

JUDGE WINKLER: All right.

MR. DUBE: Mark this as Joint Exhibit 9.

(The documents referred to were marked Joint Exhibits 9 and 10 for identification.)

MR. DUBE: I propose to stipulate that on June 19, 1974, Respondent by its Plant Industrial Relations Manager, L. P. Cecchini, C-e-c-c-h-i-n-i, sent two letters to Local 588 President Richard Marco, and that the letters marked as Joint Exhibits 9 and 10 are true and accurate copies of the letters sent by Mr. Cecchini and received by Mr. Marco.

[16] JUDGE WINKLER: Received.

(The documents heretofore marked Joint Exhibits Nos. 9 and 10 for identification, were received in evidence.)

JUDGE WINKLER: Off the record.

(Discussion off the record.)

MR. DUBE: I would propose a stipulation that on July 2nd, 1976, the International Union, United Auto Workers, by its Vice President Ken Bannon, B-a-n-n-o-n, mailed a letter to Mr. L. Denise, D-e-n-i-s-e, then Respondent's Vice President of Labor Relations. Joint Exhibit 11 is a true and accurate of the letter sent by Mr. Bannon and received by Mr. Denise.

(The document heretofore marked Joint Exhibit No. 11 for identification, was received in evidence.)

(Discussion off the record.)

JUDGE WINKLER: On the record.

MR. DUBE: I should correct that stipulation and propose an amendment to that stipulation, Your Honor. Joint Exhibit 11 was not sent to Mr. Denise but was sent to—

JUDGE WINKLER: Ford Motor Company, Attention: Mr. McKenna?

MR. DUBE: Right.

JUDGE WINKLER: Very good.

MR. DUBE: Would you mark that Joint Exhibit 12?

[17] (The document referred to was marked Joint Exhibit No. 12 for identification.)

MR. DUBE: I would propose to stipulate and offer, based on the stipulation, the document marked

as Joint Exhibit 12, which is a letter dated July 2nd, 1973, from Mr. Bannon to Mr. Denise.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 12 for identification, was received in evidence.)

MR. DUBE: I would propose to stipulate that Local 588 does not admit to membership or represent for purposes of collective bargaining employees other than employees of Respondent employed at the Chicago Stamping Plant. Other than Local 588, no other labor organization represents any employees of Respondent at the Chicago Stamping Plant.

MR. ROONEY: Just a minute. I would like to go off the record.

(Discussion off the record.

JUDGE WINKLER: On the record.

Thus far the parties have stipulated to everything that has been proposed. There is some stipulation that Respondent desires in connection with the last mentioned stipulation to the effect that—mentioning Local 588—Respondent desires to point out, which in fact the General Counsel [18] alleges in his Complaint, that the International and not Local 588 is the certified bargaining representative. Is that correct, sir?

MR. ROONEY: Yes.

JUDGE WINKLER: Continue, please.

MR. DUBE: Mark that as Joint Exhibit 13.

(The documents referred to were marked Joint Exhibits Nos. 13, 14 and 15 for identification.)

MR. DUBE: I would propose to stipulate that the document marked for identification as Joint Exhibit 13 is a true and correct copy of a letter sent to Mr. Tom Brown by Mr. Richard Marco, sent by Mr. Marco on or about February 13, 1976, and received by Mr. Brown.

JUDGE WINKLER: Can we identify Mr. Brown?

MR. DUBE: Industrial Relations Manager of the Ford Motor Company.

JUDGE WINKLER: I think that is identified through the Pleadings, as I recall. That is very good. Joint Exhibit 13 is received.

(The document heretofore marked Joint Exhibit No. 13 for identification, was received in evidence.)

MR. DUBE: I would also propose to stipulate that the document marked as Joint Exhibit 14 is a true and accurate copy of a letter dated March 23rd, 1976, sent to the same [19] Mr. Brown by the same Mr. Marco and received by Mr. Brown.

JUDGE WINKLER: Joint Exhibit 14 is received.

(The document heretofore marked Joint Exhibit No. 14 for identification, was received in evidence.)

MR. DUBE: And I would propose to stipulate that the document marked as Joint Exhibit 15 is a true and accurate copy of a letter dated February 18, 1976, sent to Mr. Marco by Mr. Brown on or about February 18, 1976, and received by Mr. Marco.

JUDGE WINKLER: Joint Exhibit 15 is received.

(The document heretofore marked Joint Exhibit

No. 15 for identification, was received in evidence.)

MR. DUBE: I would propose to stipulate that on April 9, 1976, at a meeting between representatives of Local 588 and the Ford Motor Company, Chicago Stamping Plant, Industrial Relations Manager Brown verbally informed Local 588's representatives that Respondent refused to provide to Local 588 the information requested in Joint Exhibit 14, and that Respondent refused to bargain about cafeteria and vending machine prices.

I further propose to stipulate that on various dates since April 9, 1976, Local 588 has requested that Respondent bargain with Local 588 about cafeteria and vending machine prices. On each occasion Respondent has refused to bargain [20] about those subjects.

With regard to the last stipulation concerning various dates since April 9th, 1976, I would propose that stipulation be amended to include the word prices, so it would read "cafeteria and vending machine prices and services."

JUDGE WINKLER: All right.

MR. DUBE: I propose to stipulate that ARA Enterprises, Incorporated, maintains a staff of ARA employees on duty at the Chicago Stamping Plant. ARA employees are engaged in preparing and serving food in cafeterias and in servicing and repairing vending machines in the plant under the supervision of an ARA Manager working in the Chicago Stamping Plant.

In July, 1973, Respondent and Local 588 commenced negotiations for a new Local agreement. Negotiations continued until June, 1974, when Joint Exhibit 7 was agreed upon. At various times during

the negotiations Local 588 requested that Respondent bargain concerning cafeteria and vending machine prices and services. Respondent's representatives replied to those requests by stating that those issues were not proper subjects for bargaining. No written or verbal agreement was concluded on cafeteria and vending machine prices.

MR. ROONEY: With respect to that, of course the same reservation on Exhibit 7 still applies.

JUDGE WINKLER: Off the record.

[21] (Discussion off the record.)

JUDGE WINKLER: On the record.

MR. DUBE: I propose to stipulate that cafeteria and vending machine services in the Chicago Stamping Plant have been provided since 1970 by ARA Enterprises, Incorporated. Prior to the commencement of such services by ARA Enterprises, cafeteria and vending machine services were provided by Al Green Enterprises, Incorporated.

Mark this as Joint Exhibit 16.

(The document referred to was marked Joint Exhibit No. 16 for identification.)

MR. DUBE: I propose to stipulate and offer, based on the stipulation, Joint Exhibit 16 as a true and accurate copy of General Plant Rules and Regulations distributed to bargaining unit employees at the Chicago Stamping Plant.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 16 for identification, was received in evidence.)

MR. DUBE: Mark this as Joint Exhibit 17.

(The document referred to was marked Joint Exhibit No. 17 for identification.)

MR. DUBE: I propose to stipulate and offer, based on the stipulation, Joint Exhibit 17 as a true and accurate copy of prices for the items shown effective February 9th, [22] 1976. These prices are the retail sales price or cost to the consumer buying them in the Chicago Stamping Plant.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 17 for identification, was received in evidence.)

MR. ROONEY: Hold it.

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: 17 is received.

MR. DUBE: Mark that Joint 18.

(The document referred to was marked Joint Exhibit No. 18 for identification.)

MR. DUBE: I would propose a stipulation that Joint Exhibit 18 shows selling prices of the items listed on November 11th, 1975.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 18 for identification, was received in evidence.)

(Discussion off the record.)

JUDGE WINKLER: We will be back at 1:30.

(Whereupon, at 12:40 p.m., the hearing in the above-entitled matter was recessed until 1:30 p.m. this same day.)

[23] AFTERNOON SESSION

MR. DUBE: I propose to stipulate that in addition to the hourly cafeteria the following food service facilities are maintained in the Chicago Stamping Plant and are open to bargaining unit employees. First, Satellite Cafeteria. The Satellite Cafeteria consists of an enclosed, air-conditioned room equipped with chairs and tables and having a seating capacity of 50 to 100 persons. No steam table or cafteria service is provided in the Satellite Cafeteria. The room is equipped only with approximately 12 coin-operated vending machines. Sold in the vending machines are hot and cold sandwiches, stews, soups, spaghetti, potato chips, pastry, ice cream, candy, soft drinks, and milk. In addition to the above, the Satellite Cafeteria houses two coin-operated coffee machines. The location of the Satellite Cafeteria is shown on Joint Exhibit 5 by notation of the number One.

The Stamping Plant also houses five coke cribs or vending machine areas. Each coke crib is an enclosed, air-conditioned room equipped with approximately 12 coin-operated vending machines dispensing cigarettes and all of the items dispensed in the Satellite Cafeteria. Of the five coke cribs in the plant, four are equipped with two coffee vending machines each. The remaining coke crib houses three coffee machines. The coke cribs are equipped with [24] chairs but no tables. Each of the coke cribs has a capacity of 40 to 50 persons with an exception of one coke crib at the southern part of the plant with a capacity of 75 to 100 persons.

JUDGE WINKLER: Off the record.

(Interruption at door.)

JUDGE WINKLER: All right. Let's continue.

MR. DUBE: The locations of the five coke cribs are indicated on Joint Exhibit 5 by notation of the letters G, H, I, J, and K. The largest, southern coke crib referred to is identified by the letter notation I. The coke crib labeled K on Joint Exhibit 5, appearing near the designation for the Satellite Cafeteria, is at ground level below the Satellite Cafeteria.

On or about February 6th, 1976, at a meeting of representatives of Respondent and Local 588, convened for the purpose of discussing unrelated issues, Respondent by its Plant Industrial Relations Manager, Thomas Brown, informed Local 588 effective February 9th, 1976, cafeteria and vending machine prices would be increased. No specific information or —no specific information or information about the amount of the increases was furnished. Local 588 had received no notice of said increases prior to the meeting on February 6th.

At the same meeting after Respondent's announcement of [25] increases, Local 588's President Marco requested that the increases be postponed until after discussions between Respondent and Local 588. Mr. Brown responded verbally at the meeting that such a postponement was not possible.

MR. ROONEY: In that respect, I would like to say that—we are still stipulating—they were increased by ARA, not by us.

JUDGE WINKLER: Is that accepted?

MR. DUBE: Yes.

JUDGE WINKLER: Okay. That stipulation is noted with the modification proposed by Respondent's Counsel.

MR. DUBE: Mark this Joint Exhibit 19.

(The documents referred to were marked Joint Exhibits Nos. 19 and 20 for identification.)

MR. DUBE: I would propose to stipulate that Joint Exhibit 19 is a list of information about restaurants in the vicinity of the Chicago Stamping Plant; Joint Exhibit 19 was prepared on behalf of the Charging Party; that Joint Exhibit 20 is also a list of information about restaurants in the area of the Stamping Plant; Joint Exhibit 20 was prepared on behalf of the Respondent. We would propose to stipulate that Joint Exhibits 19 and 20 are admissible for the truth of the matter asserted on each exhibit, but that by so stipulating to their admissibility, neither party—no party is stipulating to the truth of the matter [26] asserted on this.

JUDGE WINKLER: I don't quite understand this. I thought you said you were stipulating to the truth. Then you say you are not stipulating to the truth.

MR. DUBE: Stipulating to the admissibility in order to determine the truth.

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: On the record.

Let the record show that the parties are stipulating that the information contained on both 19 and 20 is accurate, with the further stipulation respecting Joint Exhibit 20 that the column listed "Time", the parties are stipulating that the test period used

in driving the mileage indicated was done at approximately 12 to 12:30 noon, is that correct?

VOICE: In that vicinity, yes.

JUDGE WINKLER: Very good. Received.

(The documents heretofore marked Joint Exhibits Nos. 19 and 20 for identification, were received in evidence.)

JUDGE WINKLER: Continue, please.

MR. DUBE: We would propose to stipulate that beginning on February 16th, 1976, and ending on or about June 7th, 1976, there was a boycott by Local 588 members of the cafeteria and vending operations. The cafeteria boycott [27] continued until May 19th and the vending machine boycott continued until June 7th. Substantially in excess of half of the members of Local 588 observed the boycott during these periods and refrained from using the cafeteria and vending machines.

JUDGE WINKLER: That stipulation is noted.

MR. SCHUR: Could we go off the record?

JUDGE WINKLER: Off the record.

(Discussion off the record.)

JUDGE WINKLER: On the record.

MR. DUBE: I would propose a further stipulation regarding Joint Exhibits 19 and 20, which have already been received. Regarding Joint Exhibit 19, I propose to stipulate that that exhibit be received with the exception of the price information shown thereon. And I propose to stipulate that Joint Exhibit 20 be received with the exception of the time information shown thereon.

JUDGE WINKLER: Okay. The stipulation modifying the earlier stipulation is noted.

Okay.

MR. DUBE: Mark this as Joint Exhibit 21.

(The document referred to was marked Joint Exhibit No. 21 for identification.)

JUDGE WINKLER: Off the record.

(Discussion off the record.)

[28] MR. DUBE: I would propose to stipulate and offer, based on the stipulation, a set of documents marked as Joint Exhibit 21, consisting of a letter dated March 7th, 1972; a letter dated February 11, 1972; a catering vending agreement executed February 11th, 1972, signed by Sidney Kelly, K-e-l-l-y, Secretary of Ford Motor Company; and some blank forms appended to the agreement. I will offer Joint Exhibit 21.

JUDGE WINKLER: Received.

(The document heretofore marked Joint Exhibit No. 21 for identification, was received in evidence.)

JUDGE WINKLER: Anything else?
MR. ROONEY: Yes.
JUDGE WINKLER: Off the record.

(Short recess taken.)

MR. ROONEY: The parties are stipulating the—to the following additional stipulation: In some months revenues exceed costs and in some months the opposite has occurred. When revenues exceed costs, the Employer realizes income, and when costs exceed revenues a loss occurs. For all recent years, the operation has been on a loss basis and the Employer has made up the loss to ARA.

JUDGE WINKLER: Very good. The stipulation is received.

MR. ROONEY: Could we go off the record?

[29] (Discussion off the record.)

JUDGE WINKLER: Do we have any more stipulations?

MR. ROONEY: Yes.

The following representative data is submitted by the parties as an additional stipulation: In the period January 10th through January 16th, 1976, the total customer count at the—

(Conference off the record.)

MR. ROONEY: —at the cafeterias was 3,947; a total hourly cafeteria count 3,873—hourly population was 3,750.

(Conference off the record.)

MR. ROONEY: This is for the main cafeteria in the facility. There were 3,873 hourly employees during this period. During the period February 28th through March 5th, 1976, the total customer count was 875 total—820 hourly cafeteria and a total plant population of 3,950.

With respect to the period 1-10 through 1-16-76, the plant population is approximately 3,750. During the period November 15th through November 21st, 1975, there was a total customer count of 3,938, hourly—3,865; plant population, 3,755. As used here "hourly" means hourly people using the cafeteria. 11-15 through 11-21-75 showed 3,938 total customer count; 3,865 in the hourly cafeteria; 3,755, plant population. October 12th through October 18th, 1974,

showed 6,745 total customer count; 5,600 in the hourly [30] cafeteria; 4,445, total plant population.

In the period 1-10 through 1-16-76 in the vending sales, customer count showed 70,560 units sold; in the period 2-28 through 3-5-76, the number was 16,741 units sold. And between November 15th and November 21st, 1975, units sold were 61,568; and in the period October 12th through October 18th, 1974, units sold were 96,279.

JUDGE WINKLER: Very good.

MR. ROONEY: Off the record.

(Discussion off the record.)

MR. ROONEY: With respect to the figures given for plant population, it includes the total plant population and not just the hourly employees represented by Local 588.

MR. DUBE: Would you mark this Joint Exhibit 22?

(The document referred to was marked Joint Exhibit No. 22 for identification.)

MR. DUBE: I would propose to stipulate that Joint Exhibit 22 is an accurate collection of lists showing the number and type of vending machines in the hourly cafeteria, Satellite Cafeteria, and coke cribs previously described in the record, and to stipulate that the Satellite Cafeteria is denominated on Joint Exhibit 22 as Plant Location Z-20 Upper.

JUDGE WINKLER: 22 is received.

[31] (The document heretofore marked Joint Exhibit No. 22 for identification, was received in evidence.)

JUDGE WINKLER: Off the record.

(Discussion off the record.)

MR. DUBE: Your Honor, I think we have reached the end of the stipulations that we have negotiated.

JUDGE WINKLER: Very good.

You have some witnesses or a witness to call?

MR. DUBE: I do. I would like to take about five minutes to check over my notes on questions so I don't spend time needlessly.

JUDGE WINKLER: Okay. Let's come back at 3 o'clock.

(Short recess taken.)

JUDGE WINKLER: Will General Counsel please call his witness?

MR. DUBE: General Counsel calls Richard Marco.

RICHARD W. MARCO,

called as a witness for and on behalf of Counsel for the General Counsel herein, and after having been first duly sworn, was examined and testified as follows:

JUDGE WINKLER: Please be seated, sir, and state your name and address.

THE WITNESS: My name is Richard W. Marco, M-a-r-c-o. My business address is 21540 South Cottage Grove Avenue. [32] That is in Chicago Heights, Illinois.

DIRECT EXAMINATION

Q (By Mr. Dube) You are President of Local 588, Mr. Marco?

A Yes, that is correct.

Q Do you hold any other title or position with Local 588?

A I am Chairman of the Bargaining Committee by virtue of my election to President.

Q How long have you held those offices?

A Since June of 1972.

Q Had you held any Union offices before 1972?

A Five out of the six years prior to that I was a District Committeeman.

Q Have you ever worked in the Chicago Stamping Plant yourself?

A Yes. I have been employed by Ford at the Chicago Heights Stamping Plant since July 23rd, 1956.

Q What kind of work do you do for Ford?

A I am a die maker.

Q Are you a full-time Union officer now?

A Yes.

Q Do you ever work in the Stamping Plant?

A On occasion, to work overtime, I work in the plant with my tools, but other than that I am on full-time Union duties, which do take me in the plant.

[33] Q How often do you go into the plant?

A Almost daily.

Q I think the record will show that there are normally three shifts of employees at the Chicago Stamping Plant. Do bargaining unit employees normally work on Saturdays and Sundays?

A The history over the 20 years I have been there is that a good deal of the employees do work on Saturdays and sometimes on Sunday. More recently, since '74, there hasn't been as much overtime.

Q Is the hourly cafeteria open on Saturdays and Sundays?

A Only when there is a significant number of hourly employees that are working those shifts. It's a very slight number. Their cafeteria is not open for hot meals.

Q How often on Saturday and Sunday is the hourly cafeteria open?

A In the 20 year history I would say that approximately 75 percent of the time it's been open.

Q Is the Satellite Cafeteria open on Saturdays and Sundays?

A I would say rarely on Sundays. It's open—I don't believe they lock it as such. A person could go in there but officially it's not open on Sundays; only when there's shipping activity.

Q What about—there is an exhibit showing—there is [34] a stipulation on scheduled lunch periods at the Chicago Stamping Plant. Is the Satellite Cafeteria open for all of those?

A Officially the Satellite Cafeteria is only open for the latter two lunch periods of the three on the two production shifts; or maybe, put another way, it is not open for the lunch periods on days and afternoons officially.

Q How do most bargaining unit employees get to and from the Chicago Stamping Plant?

A Almost all of them drive or ride in a car pool.

Q There is a stipulation there is some bus service in the area of the Stamping Plant. Is there a bus stop outside the plant itself?

A No, there is no marked busstop. The people, I would presume, would have to stop the bus at the traffic light.

Q In the course of a normal day or a normal week, how many employees have you observed using the bus to get to or from work?

A I don't recall observing anyone use the bus coming to or going from work, although it wouldn't surprise me if someone did, but it's very slight, if any.

Q Now, there is some stipulations that cover rest periods or break time for direct production employees. Are there bargaining unit employees, other than those direct production employees?

[35] A Yes. There is indirect, Production Control Department employees and skilled tradesmen.

Q Do those people get breaks in an eight-hour shift in addition to their lunch period?

A Yes, they do, but not with any specified amount of time or with tag relief as the production employees do.

JUDGE WINKLER: May I ask where we are going with this? What are we trying to accomplish with this? I am not trying to be critical. I am just asking. Maybe we can short circuit.

MR. DUBE: To establish there are break periods.

JUDGE WINKLER: And that employees use the eating facilities, right? Is that it?

MR. DUBE: The length of break period and the fact that the witness would testify that employees are not allowed to leave the plant during those break periods.

JUDGE WINKLER: Is there any question about that?

MR. ROONEY: I don't think it is feasible for them to leave in a break period.

JUDGE WINKLER: Let the record show the parties are stipulating—apart from their luncheon

period, the parties are stipulating in view of the time limitation it is not feasible for the employees to leave during the break period. Is that a fair statement?

MR. SCHUR: It goes further than the time limitation.

[36] JUDGE WINKLER: Would the parties stipulate thus far—

VOICE: It's not a rule. He can get a pass and go.

JUDGE WINKLER: The parties are not stipulating to that?

MR. ROONEY: It's not feasible to me, but the party can get a pass and go.

JUDGE WINKLER: Okay. Proceed.

MR. ROONEY: We admit it is not eafeasible.

JUDGE WINKLER: The Respondent concedes it is not feasible for the employees to leave the plant during these break periods. Okay.

Q (By Mr. Dube) Are employees permitted to leave the plant during break periods?

JUDGE WINKLER: Isn't it enough that Respondent concedes it is not feasible for them to leave?

MR. SCHUR: We would like to show, Your Honor, that it is not permitted in addition to not being feasible.

JUDGE WINKLER: The Respondent concedes the practicality so you don't even have to reach the other issue.

MR. DUBE: Well, all right. There is another question beyond this that goes to the captive audience issue basically, that employees are not permitted to leave the building during break periods. And I will explain the relevance of that.

JUDGE WINKLER: Well, I can understand the relevance, [37] but it seems to me that is sort of subsumed in the other thing.

MR. DUBE: I am trying to work around the unfinished edges of those stipulations.

I am not sure if you answered the last question or not.

Q (By Mr. Dube) Do you recall the last question?

A The last question you asked, as I recall, are people permitted to leave the premises for their break time, and the answer is no, not to my knowledge, they are not allowed to leave.

JUDGE WINKLER: Even if they were allowed to leave, would it be feasible for them to leave?

THE WITNESS: No, sir, it would not.

Q (By Mr. Dube) Are employees allowed to go outside the plant although staying on the plant grounds during break period?

A No. They would be charged with loitering. They are supposed to stay in the building.

Q Okay. Are bargaining unit employees permitted to go into the hourly cafeteria with a brown-bag lunch and just buy a beverage?

A During the lunch period, yes.

Q What about during break periods?

A They are not allowed in there during break periods.

Q In a normal day or a normal week, have you seen any [38] food trucks, food vendors, mobil food vendors, outside the plant property?

A No.

Q Have you ever seen such vehicles on plant property?

A No, never.

Q Have you ever seen employees pick up deliveries of food immediately outside the plant?

JUDGE WINKLER: I think the witness just answered that question.

THE WITNESS: No, I have not.

Q (By Mr. Dube) Is there any specific procedure that a bargaining unit employee has to follow when leaving the plant during a shift?

A Yes, there is.

Q Could you explain that procedure?

A The employee must get a pass from his supervisor, which is permission to leave the plant, and then most often they are required to punch out their time card, and when they leave the building they get into their automobile, and as they leave the plant premises they leave the pass that they got from their supervisor with the plant security guard at the exit open to Cottage Grove Avenue. On their return they must get checked back in by the guard. And I believe the guard gives them the pass back, which they in turn give back to their foreman when they return to work and punch [39] their time card back in.

Q That security location you mentioned, that is outside the plant building?

A It is outside the building and on the exit from the parking lot to Cottage Grove Avenue.

Q Are there any locations inside the building where an employee would have to stop while either going out or coming back from such a trip?

A Occasionally a person leaving the plant at lunch time would be stopped at the Security Office, which is on the mezzanine, and asked to identify himself and produce a pass as to where he was going and make sure it was authorized.

Q Could you describe this exit or gate near Cottage Grove Avenue?

A Location of it?

Q The physical appearance of the gate itself.

A Well, there is a guard shack that is right in the middle, and there is one lane of traffic coming in and one going out on each side. There is a railroad crossing type gate that is activated by the guard. It must be raised before a car can go out, or on the other side it must be raised to allow a car to enter.

Q Are employees the only vehicle drivers who would use that gate?

[40] A No. All materials that are shipped out of the plant by truck, or any deliveries made, come through that same entrance.

JUDGE WINKLER: We are talking again about the possibility of an employee wanting to leave in a break period or are we talking about luncheon?

MR. ROONEY: Any time.

JUDGE WINKLER: All right.

Q (By Mr. Dube) All right. Mr. Marco, you testified there is one traffic lane or one vehicle lane in each direction, inbound and outbound. Have you ever seen cars or vehicles lined up at that gate, either inbound or outbound, around the time of the meal break period?

A Yes, I have.

Q In your term of service as District Committeeman or Local President, are you aware of any cases where employees have been disciplined from returning after leaving the plant during a shift?

A Yes, I am aware. I am aware of many of them. I represented as many as five employees on one occasion, as I can recall as a District Committeeman,

and I have bargained on grievances involving discipline in regard to numerous other cases over the years.

Q Are there any restrictions or rules on where a bargaining unit employee can eat food and drink beverages in the [41] Stamping Plant?

A Yes. They are limited to eating or drinking in the cafeteria or in the employee break areas or coke cribs. They are not allowed anywhere else.

Q What about the locker areas on the mezzanine?

A They are not to eat in there. Only in the cafeteria or coke cribs.

Q Are you aware of any instances where employees have been disciplined for eating in the areas other than you have described?

A I know of employees who have been told to leave and admonished for being in there. Formally I don't know that they were disciplined.

Q Now, it appears from the stipulation that the locker areas on the mezzanine are not air-conditioned. What kind of ventilation, if any, is provided in the locker areas on the mezzanine?

A There are some ventilating ducts coming into that vicinity, but they don't seem to do much good. It is very hot and sticky and smelly in there. If there is any air moving it doesn't seem noticeable.

Q When you say "hot" do you know what heat the inside of the plant reaches during the summer?

MR. RONNEY: Objection.

JUDGE WINKLER: What basis?

[42] MR. ROONEY: I don't see what this has to do with this case at all, the heat in the plant in the summer.

MR. DUBE: Well, the argument is that there are —in a plant where there is heat or where there are fumes or odors that that is the disincentive to carry and use a brown-bag lunch, in addition to the fact the record already shows that the vending machines and cafeteria areas are air-conditioned, which may be an incentive to use those if the rest of the plant is unpleasantly hot.

JUDGE WINKLER: Are they, or not, permitted to bring their brown bags into the cafeteria?

MR. DUBE: Yes, they are allowed to bring them in. I think the question goes to where it is kept in the meantime.

JUDGE WINKLER: Where what is kept?

MR. SCHUR: One, if I may state so, one of the thrusts of the question is to determine that the locker room is very hot, which would lead to food spoilage in the event an employee would bring his lunch and store it in the locker room, which is the only place he could store it.

JUDGE WINKLER: Objection overruled, if that is the basis for it.

Q (By Mr. Dube) Do you recall what the last question was?

[43] JUDGE WINKLER: You asked about the—

THE WITNESS: If I recall, temperatures in the plant. The answer is yes, because routinely in the summertime we take temperature readings throughout the plant, and we have taken a large number of those surveys year after year. I do recall temperatures in excess of 100 degrees in the plant during the summertime.

JUDGE WINKLER: Would it be rare to go above 90, for example?

THE WITNESS: No, not at all.

JUDGE WINKLER: Would it be unusual to go above 80?

In other words, does it frequently go above 80 in the summertime?

THE WITNESS: It frequently goes above a hundred.

JUDGE WINKLER: Okay.

MR. DUBE: Would you mark these as General Counsel's Exhibit 2?

(The documents referred to were marked General Counsel's Exhibit No. 2 for identification.)

Q (By Mr. Dube) Mr. Marco, I am going to ask you to look at what has been marked for identification as General Counsel's Exhibit 2, and ask if you can identify that.

A Yes. I recognize this as a copy of a survey similar to those that I told you we frequently take in the summertime. This particular one was taken at my direction in [44] August of 1973.

JUDGE WINKLER: Was this an unusually hot day, do you recall?

THE WITNESS: On the first page, Your Honor, it lists the temperature outdoors on that particular day.

JUDGE WINKLER: Was this particularly hot in the sense—was it hot as compared with other days? That is what I am after. For example, on that day outdoors it was 96 at 2 p.m. What about August 26th or August 28th? Do you have any idea? The point of the question is how accurate a sampline is this one example; that is what I am asking.

THE WITNESS: I think in relationship to the temperature outside, if it was 90 degrees on the next day, Your Honor, it would be cooler inside as well.

JUDGE WINKLER: I suppose I am not able to communicate.

MR. DUBE: Your Honor, are you asking what would be the average summer temperature in the Chicago Heights area?

JUDGE WINKLER: That is what I am asking, if you know.

THE WITNESS: I don't know, Your Honor.

MR. DUBE: Your Honor, I would offer General Counsel's Exhibit 2.

JUDGE WINKLER: We will take General Counsel's 2 as indicating the temperature as of that date, August 27th, '73.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received [45] in evidence.)

Q (By Mr. Dube) Mr. Marco, do you make your home in the Chicago Heights area?

A Yes. I live about three and three-quarter miles from the plant in the Village of South Chicago Heights, which is adjacent to the City of Chicago Heights.

Q How long have you lived in the area of Chicago Heights?

A At the present location, 16 years; and prior to that I lived three years, three or four years, in Glenwood, which is adjacent on the north to Chicago Heights.

Q From your experience in living in the Chicago Heights area, do you recall the temperature reaching 95 each summer?

A Frequently. It's not uncommon or unusual at all.

Q Concerning the possibility of spoilage of food, Mr. Marco, have you as Union Officer received complaints, any complaints, of actual food spoilage from unit employees?

A Yes, I have.

MR. ROONEY: Objection, Your Honor. That is all hearsay.

MR. SCHUR: It's not offered, Your Honor, necessarily to prove—

JUDGE WINKLER: It really is. On the other hand, I will take it, even though technically I see the point of your objection.

THE WITNESS: Yes, I have received complaints of spoilage, people bringing their lunch.

[46] JUDGE WINKLER: When was the last time you got such a complaint, if you remember?

THE WITNESS: It was in May of 1976.

JUDGE WINKLER: All right.

THE WITNESS: Those were numerous complaints, too, not just an isolated one in May.

Q (By Mr. Dube) Mr. Marco, you testified that as a Union officer you still go into the plant on a regular basis. When you go into the plant, have you had occasion to go into the hourly or Satellite Cafeterias or the Coke Cribs during 1976?

A Very frequently, yes.

Q For what purpose?

A Well, it is the most convenient place to talk to people because it is quieter in there as well as

cooler. And otherwise it is very difficult. You have to shout and scream to get over the noise. So I go in there frequently.

Q Let me show you what has been received in the record as Joint Exhibit 17, the food price list marked effective February 9th, 1976. Are you familiar with what the prices were for any of the items on Joint Exhibit 17 prior to February 9th, 1976?

A Most of them were five cents lower; some, perhaps, ten cents lower prior to February 9th.

Q The record also contains some evidence about a boycott [47] organized by Local 588 which commenced on February 16th. Were any of the items, any of the food or beverage prices, charged to employees reduced after February 16th?

A No, they were not.

Q Was there any change in cafeteria prices?

A Not actually. There was a change in method of dispensing milk from cartons to bulk, but for the same item in the same form, there was no reduction in price. With the possible exception of some specials that were offered.

Q Would you explain what you mean by a "special"?

A Well, it is not unlike a restaurant.

JUDGE WINKLER: They have loss leaders sometimes, is that it? That is what is known in the retail trade—

THE WITNESS: I'm not sure it is a loss item, but frequently—well, maybe not so frequently—in the past the cafeteria used to offer a special now and then. I can remember them having spaghetti for 99 cents, and something like that.

JUDGE WINKLER: I think—maybe I am taking too much for granted, but I would presume that all parties will stipulate that the boycott did not lead to a diminution in prices, is that correct?

MR. ROONEY: Right.

JUDGE WINKLER: So stipulated?

MR. DUBE: So stipulated.

[48] JUDGE WINKLER: I presume that is the point you were trying to get at?

MR. DUBE: Right.

Q (By Mr. Dube) How was the decision to end the boycott reached? Was that an individual decision?

JUDGE WINKLER: What difference does tit make?

MR. DUBE: Well, the basis for the discussion, any discussions, about why the boycott should be ended.

MR. ROONEY: Your Honor, I don't see what this has to do with the union bargaining duty to bargain cafeteria prices. I imagine he could testify about ten minutes here about arguments that were held in the committee that argue to end it or to continue it.

JUDGE WINKLER: I am afraid we would be getting into an awful lot of hearsay, if you want to get into that question. I am guessing as to what you have in mind.

Let's see. Did the boycott end as a result of committee action or as a result of general employee action, if you know?

THE WITNESS: As a result of committee action.

JUDGE WINKLER: Committee action. And I guess Counsel would like to ask you why they voted to end the boycott. Do you know the answer to that?

THE WITNESS: The answer to that, the food they were carrying into the plant was spoiling as the temperature [49] increased.

JUDGE WINKLER: When was this?

THE WITNESS: In June we finally ended it. It was becoming too great a sacrifice to ask people to do in the hot summer.

JUDGE WINKLER: During this period did anyone go out to lunch, sir?

THE WITNESS: I am sure some people did, Your Honor, but a very, very, very few, I would think.

JUDGE WINKLER: It is proportionately very few, is that it?

THE WITNESS: Yes. I would think possibly not more than a dozen people during a given lunch period would go out.

Q (By Mr. Dube) Was that during the boycott period?

JUDGE WINKLER: We weren't talking about boycott period; we were talking generally.

MR. DUBE: Okay.

Q (By Mr. Dube) Just a couple more questions, Mr. Marco. If you would look at Joint Exhibit 19, and then I am going to ask you to look at Joint Exhibit 2. Joint Exhibit 19 makes reference to three groups of restaurants, Group A, Group B, and Group C. Would you be able to tell us approximately where the locations are of Groups A, B, and C? If you could, mark those on Joint Exhibit 2 with a corresponding letter A, B, and C.

[50] JUDGE WINKLER: The witness has complied with your request.

Q (By Mr. Dube) Mr. Marco, these locations are all—appear to be west of the Chicago Stamping Plant. Would you be able to look at 14th Street, also referred to on the map as Lincoln Highway, and tell us approximately how many stop lights there would be between Cottage Grove Avenue and Halsted Street?

A Well, there is one right at Cottage Grove and 14th Street; there is one in front of the plant that operates at shift time; there is one at State Street; there is one at Wentworth; one at East End Avenue; and there is one at Halsted.

Q What about on Halsted north of 14th Street?

A Well, there is on at, I believe it's 13th, but it might be 12th; and there is another one at, I believe it's 10th Street; there is another one at the Five Corners; and then one at Joe Orr Road.

Q What about on Vincennes, V-i-n-c-e-n-n-e-s, Road south of 14th Street? If you don't recall the exact location, if you can recall a number, any number, of the stop lights between 14th Street and Sauk Trail Road?

A There is one at 15th Street; there is another one at 16th Street; there is a flashing traffic light at Main Street; there is a traffic light at 26th Street. I believe [51] that is all between there and Sauk Trail. There is one more at—no, I think that is eliminated now at Illinois Street.

Q During 1976 on any occasions when you spoke to Mr. Brown or any other representatives of Ford, did any representative of Ford ever say anything about Local 588 discussing food service or food prices with ARA, directly with ARA?

A I don't think I understand your question.

Q All right. During 1976 did Mr. Brown or any other representative of Ford ever say anything concerning the possibility of Local 588 representatives discussing food service or food prices directly with representatives of ARA?

A Yes. We were informed that we could not discuss them with ARA.

Q Do you recall who told you that?

A Mr. Brown, among others.

JUDGE WINKLER: What would happen if you would?

THE WITNESS: Well, as a matter of fact, I attempted to and was told they couldn't talk to me.

JUDGE WINKLER: ARA said they couldn't talk to you?

THE WITNESS: Yes. We requested that a meeting be set up for us with ARA, and the Company refused.

JUDGE WINKLER: Just off-hand, I don't know. I am sure they could tell you—Ford could tell you not to talk [52] to ARA but it's a free country, I guess.

THE WITNESS: In fact, Your Honor, I did go to the cafeteria manager of ARA. He told me he couldn't discuss those matters with me and to see the company manager.

JUDGE WINKLER: That is something else. They might refuse to talk to you. I don't know that anybody can tell you you can't. However, I'm always subject to being educated.

Q (By Mr. Dube) Have you received complaints from bargaining unit employees about the locker room other than the things you have mentioned, heat and humidity?

A We have gotten numerous complaints about cockroaches in the lockers.

Q Have you ever seen cockroaches in the lockers yourself?

A Yes, I have.

Q Do you know in those cases if any food was damaged or destroyed by cockroaches?

A Well, I recall a particular day when I went into the hourly cafeteria and sat down with four people in the lunch room, and of the four people, two of them told me they had to just throw their lunch away because when they opened their dinner bucket they found a cockroach in there.

MR. ROONEY: I object, Your Honor, to that. It's really hearsay and proves nothing.

JUDGE WINKLER: Sustained.

Is that it?

[53] MR. DUBE: Let me check for one moment.

(Conference off the record.)

MR. DUBE: I have nothing further.

JUDGE WINKLER: Cross?

CROSS EXAMINATION

Q (By Mr. Rooney) Mr. Marco, have you ever complained to the Company about the sanitary conditions in the locker rooms?

A Yes, sir, on numerous occasions.

Q Have they ever done anything?

A They notified us or informed us they would have the exterminator come in again and again.

Q Have you ever seen the exterminator there?

A Yes.

Q You indicated that the traffic light in front of the plant does not operate at noontime, is that right?

A I believe it to be steadily on green except at the shift change times. Then it changes from green to red and back and forth.

Q You indicated something about gates. Are those gates operating during lunch periods?

A Yes, they are.

Q How many times have you seen a tie-up at the gates?

A Frequently.

Q As frequently as you have seen the temperature over 95 in Chicago?

[54] MR. SCHUR: I'm going to object to the question, Your Honor.

JUDGE WINKLER: Sustained.

Q (By Mr. Rooney) Have you a count of the number of people using the cafeteria during any day?

A No.

Q Now, I show you a document dated April 21, 1976. Do you ever remember seeing this document?

A No, sir, I don't recall. I believe I was on vacation at that time?

JUDGE WINKLER: Was that issued by the Union, sir?

THE WITNESS: I really couldn't say, Your Honor. I don't recall ever seeing it before. It is not our standard format in any event. It doesn't look like what we usually put out. I would be inclined to say no.

Q (By Mr. Rooney) Now, it says in this document that most complaints were that enough concessions were not made in the break area. Did you ever hear that complaint made by union members?

A The members complained that the prices were not rolled back.

Q Yes.

A That is no concession really, as opposed to not enough.

Q Who made the decision to suspend the boycott?

A I did at the direction of the Shop Committee, composed of [55] District Committeemen and Bargaining Committeemen.

Q Did you agather some statistics from the employees as to their preferences?

A Several weeks prior to actually calling off the boycott, some time in April, as I recall, there was a survey taken but once again I wasn't in town; I was on vacation. I was informed on my return they had taken a survey of all the members.

Q And the survey indicated what?

A The survey results, I was told by those who tabulated them on the Bargaining Committee that the membership voted, I believe it was 56 percent to 44 percent to continue the boycott. And it did continue.

JUDGE WINKLER: Was another vote taken after that to discontinue the boycott?

THE WITNESS: No, Your Honor.

Q (By Mr. Rooney) Did you talk about extending the boycott to other locals of the UAW outside of the plant?

MR. SCHUR: Objection.

MR. DUBE: Objection. First, I don't see the relevancy and, second, even if the question was relevant, it is still too vague.

JUDGE WINKLER: I will sustain that objection.

MR. ROONEY: I will withdraw that.

Q (By Mr. Rooney) What were the people doing who were [56] observing the boycott for lunches?

A During the time of the boycott?

Q Yes.

A They were either not eating at all or carrying food to work.

Q Well, do you think most people were not eating?

A No. I would think most people were carrying their lunch as opposed to not eating, but some were fasting.

Q Now, in your discussions in the Union of the reasons to end this boycott, the only thing you discussed was food spoilage?

A No, I don't think that was the only thing; that was the factor that made our decision.

Q What else was there that was discussed?

A The lack of progress and anything happening.

JUDGE WINKLER: By "anything happening", bringing down the cost of the food?

THE WITNESS: Yes. It appeared that we were at a hopeless deadlock.

Q (By Mr. Rooney) Did you talk about trying to get the information—did you talk about attempting to get the information and compelling the Company to bargain by other means, and therefore the boycott was no longer necessary?

A Yes. In April after the Complaint was issued, the National Labor Relations Board Complaint was issued, we pre- [57] sumed we could work things out either through that or through the negotiations.

Q So that there were other factors besides spoilage of some people's lunch?

A Yes. But once again, the factor that caused us to make that decision was the warmer weather and the spoilage. That was the key factor.

Q How many people can sit in the cafeteria at one time?

A Just an estimate, I would say between 4- and 500; probably closer to 400. I have never counted the chairs. Just guessing.

Q How many people are there on the two major shifts?

A Between 1500 and 1600, I would say.

Q How many lights are there on Joe Orr Road?

A On Joe Orr Road? The only traffic light I know of—and I presume you are talking about from the plant in the direction of the restaurants in that Group A?

Q Yes.

A The only traffic light there would be at the intersection of 14th Street and Cottage Grove, and at Halsted Street and Joe Orr. However, there are at least three stop signs in there—no, two—as opposed to traffic lights. I think Counsel asked earlier going in a different direction.

MR. ROONEY: No further questions.

JUDGE WINKLER: Redirect?

[58] MR. SCHUR: I have some questions, Your Honor.

JUDGE WINKLER: You have some?

REDIRECT EXAMINATION

Q (By Mr. Schur) Mr. Marco, since 1956 when you entered the plant, has Local 588 had stewards and committeemen?

A Yes, they have since 1956. I don't remember exactly the month, but—

Q And have these stewards and committeemen filed grievances and generally administered the contract with Ford?

A Yes, they have.

Q You testified about the number of people who go out to eat lunch. During the boycott did the number of people leaving the premises to eat lunch outside the plant increase?

A No, not that I can recall.

JUDGE WINKLER: Would you know the answer to that, sir?

THE WITNESS: Not from my observation, there was no increase.

JUDGE WINKLER: You don't know whether there was or not? Do you know that?

THE WITNESS: I didn't notice any increase.

JUDGE WINKLER: Did you notice any decrease?

THE WITNESS: No.

JUDGE WINKLER: The witness doesn't know the answer to that. Next question.

Q (By Mr. Schur) Well, is it your opinion that it stayed [59] the same based on your observations?

MR. ROONEY: Objection.

JUDGE WINKLER: Sustained.

Q (By Mr. Schur) All right. You mentioned insects in the plant. Are there rats or mice in the plant?

A We have observed them in the break area.

Q Are you now engaged in negotiating with the Ford Motor Company looking toward the signing of a Local agreement at this particular plant?

A Yes, I am.

Q And approximately when did those negotiations begin?

A July 30th of this year.

Q And in those negotiations have you reached the stage where the Union makes demands upon the Company?

A Yes.

Q Has the Union made any demand with reference to cafeteria and vending machine prices and services?

MR. ROONEY: I am going to object.

JUDGE WINKLER: There is no question about this. The Company concedes in its Answer it refuses to give this data.

Q (By Mr. Schur) Has the Union made any demand in its bargaining with reference to extermination services in the plant?

A Yes, we have. We have demanded pest and rodent control [60] on a weekly basis.

I believe I said July 30th. We began negotiations, I believe it may have been the 31st.

JUDGE WINKLER: Nothing further?

MR. SCHUR: Nothing further.

JUDGE WINKLER: Anything further, sir?

MR. DUBE: Just a moment.

JUDGE WINKLER: Don't feel impelled because you have an opportunity.

MR. DUBE: No further questions.

JUDGE WINKLER: Witness excused. Thank you very much, sir.

(Witness excused.)

JUDGE WINKLER: Anything further?

I see no other witnesses. That must be the answer.

MR. SCHUR: Could we have a minute, Your Honor?

JUDGE WINKLER: Yes, sir. Take five minutes while I check my other proceeding.

(Short recess taken.)

JUDGE WINKLER: I understand that General Counsel has rested.

MR. DUBE: That is correct.

JUDGE WINLKER: Respondent?

MR. ROONEY: Rests.

JUDGE WINKLER: Let me just ask the parties one or two [61] matters.

Is there any legal impact at all—and now I am referring to Joint 7, Page 5, where it indicates that there was some bargaining respecting cafeteria service and vending service and variety at Page 5 of this exhibit, and Joint Exhibit 8—now, there is no date on that first item. Is there any way the parties can tell me what the date of that—oh, I see. "It's mutually agreed on June 19, 1974. . ." Do you have that before you, sir?

MR. ROONEY: No.

JUDGE WINKLER: It's the yellow document.

Now, I would like to have the views of both the General Counsel and Respondent on the impact again, if any, of the fact that Respondent did indeed bargain to some extent about cafeteria service, and in considering that, I haven't had too much time to go through these various exhibits. On Joint Exhibit 8 there is apparently—as of October 29, 1967, at Pages 5 and 6 there is some kind of agreement between the Company—by Company, Ford Motor Company, and the Union with respect to vending and

cafeteria service. Now, my question really comes down to this: Assuming arguendo that there is no obligation generally to bargain about the vending machine stuff and the cafeteria stuff, et cetera, does it make any difference that the parties in fact have bargained to some extent about that subject? In [62] other words, does a generally non-mandatory subject of bargaining change its character as such because there has been bargaining?

Now, I don't know the answer to that, I must say, but it is a question that sort of piques my curiosity.

MR. ROONEY: I think, if I understand correctly, the reason why the Company felt it had a duty to bargain regarding sanitary conditions and regarding having the cafeteria in the operation, where the line was drawn by Westinghouse. We don't feel we have to bargain about cafeteria prices. Westinghouse doesn't answer the question. You have read this obviously. That is a question that has to be researched and briefed, but the reason for putting them in there, from the Company's standpoint we felt we had a duty to bargain about certain aspects of the cafeteria, specifically sanitary conditions, but not prices.

JUDGE WINKLER: In any event, I think maybe all parties are caught a little by surprise by my question in this connection. Maybe not. But if you were, I think I would like some answers from the respective parties, and I could guess, you know, what the answers will be forthcoming from the respective parties.

On the other hand, we are dealing with very competent Counsel. I want to weigh the respective ar-

guments with appropriate citations of cases, et cetera, et cetera.

[63] Let me ask the General Counsel a question, if I may, please. And I am not going to ask you under Board law what the result of this case, but assuming the Court law to be the controlling law in this area, how would this present case shape up? In other words, is the instant case substantially different and therefore distinguishable from the fact situations existing in the Westinghouse case, the McCann case or McCall case, or is it the McCall case and the Laddish (phonetic) case? On the other hand, don't feel impelled to answer that unless you want to because, again, we are bound—I am going to be bound by what the Board has said. But anyway, it's an interesting question.

MR. DUBE: Well, it is an interesting question, and I suspect the Board in considering this case may feel compelled to consider it in the light of the current Circuit Court authority. I think this case does present a strong fact pattern of a captive audience.

JUDGE WINKLER: Like the other cases?

MR. DUBE: No. At least as strong as the other cases.

JUDGE WINKLER: That is not my question. My question was, is this different from the other cases?

MR. DUBE: Well, it's also a one-union plant.

JUDGE WINKLER: What difference does that make? You are referring to that case where the Court said, "Well, since we have got five or six unions that might make problems"? [64] With all respect for the Court—I am not disagreeing or agreeing with the Court—I think that was just a makeweight argument.

MR. DUBE: I think if the decision is one of basic policy, then probably this case is indistinguishable.

JUDGE WINKLER: Very good.

MR. SCHUR: Your Honor, the Charging Party feels this case is distinguishable from the others. I think I would like to reserve the right to argue that in my brief.

JUDGE WINKLER: Very good.

Well, I suppose we are down to the time for briefs. The most I can allow is five weeks. You can usually have five weeks.

MR. ROONEY: Five weeks from the record?

JUDGE WINKLER: Today.

MR. ROONEY: Can we go off the record for a minute?

(Discussion off the record.)

JUDGE WINKLER: Monday, September 20th.

Does any party desire to make any oral argument at this point?

MR. ROONEY: I would like to say that Monday, September 20th is just about four days after the collective bargaining agreement expires, and it is just going to be very difficult for me to complete a brief.

JUDGE WINKLER: Off the record.

[65] (Discussion off the record.)

JUDGE WINKLER: Let's go on the record.

Gentlemen, although the Rules provide that the limit of my authority for briefs is five weeks, I think it would be really stupid in view of the fact that Respondent's Counsel will be in national negotiations

with the UAW, and for that reason he will be in a position impossible to get a brief in by September 20th. We will take it upon ourselves to give him two weeks longer.

Briefs will be due—

MR. DUBE: Monday, October 4th.

JUDGE WINKLER: October 4th.

All right. Is there anything further anyone desires to say?

MR. ROONEY: No.

MR. DUBE: No.

JUDGE WINKLER: The record is closed.

(Discussion off the record.)

JUDGE WINKLER: On the record.

MR. ROONEY: At the beginning of this hearing you indicated we had to tell you if the agreement—

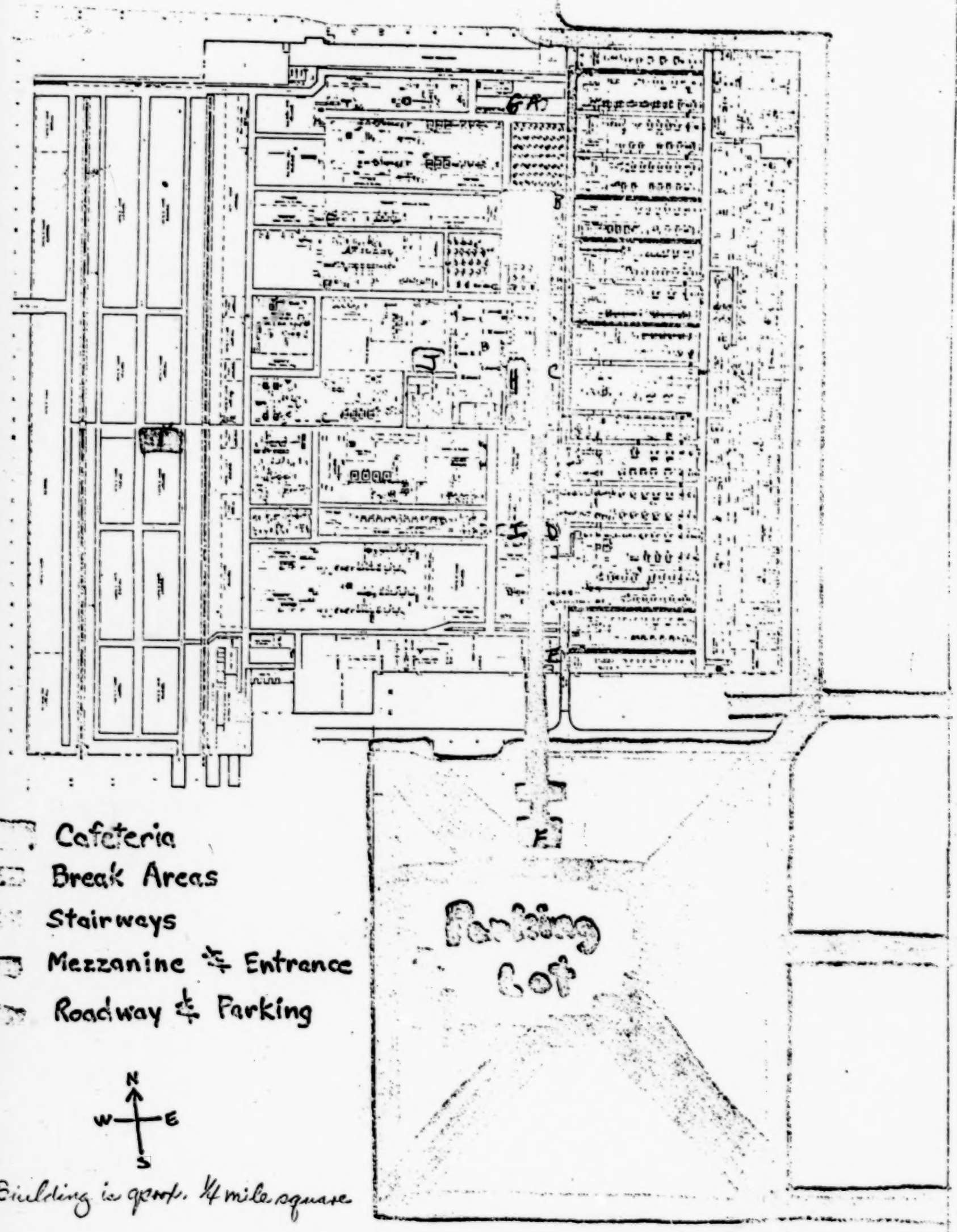
JUDGE ROONEY [sic]: Let's go off the record a second.

(Discussion off the record.)

JUDGE WINKLER: The hearing is closed.

(Whereupon, at 4:24 p.m., the hearing in the above-entitled matter was closed.)

U.S. 2[illegible] - LINCOLN HIGHWAY



CUMMINS ENGINE AVENUE

JOINT EXHIBIT 7

LOCAL UNION NO. 588
Chicago Heights, Illinois

[UAW SEAL]

International Union, United Automobile
Aircraft and Agricultural Implement
Workers of America

A G R E E M E N T S

with

FORD STAMPING PLANT
Chicago Heights, Illinois

Effective June 20, 1974

* * * *

VENDING AND CAFETERIA SERVICE

It is mutually agreed between Ford Motor Company, Chicago Stamping Plant, and the International Union, UAW Local #588, Chicago Stamping Plant Unit, on 6-19-74, that provisions covering Vending and Cafeteria Service for this plant are as follows:

1. CAFETERIA SERVICE

The Company assures the Union that steam table items will be available at all times during the regular lunch period and that a comparable selection of entries, salads and desserts will be available during all regular lunch periods. In addition, the Company will make arrangements for a delicatessen type sandwich service in the cafeteria. Cafe-

teria supervision will be available during all lunch periods to ensure that employes will be served in a *reasonable* length of time through the main serving lines as well as to provide for the adequacy of food service, condiments and utensils.

2. VENDING SERVICE AND VARIETY

To assure that vending machines will receive prompt servicing in the event of a mechanical breakdown, a sticker will be affixed to each machine indicating the number to call for repair. Further, the Company assures the Union that a greater variety of selections will be maintained in the existing vending machines and that the quality of such items will continue to meet Company standards.

The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.

FORD MOTOR COMPANY	INTERNATIONAL UNION, UAW
Chicago Stamping Plant	Local #588
L. P. Cecchini	R. W. Marco
R. L. Smith	James Trusty
	Donald Deel
	W. B. Parks
	R. Dahlke

* * * *

JOINT EXHIBIT 8

AGREEMENT

between
International Union,
United Automobile Aerospace and
Agricultural Implement Workers

LOCAL UNION NO. 588
Chicago Heights, Illinois

and

FORD STAMPING PLANT
Chicago Heights, Illinois

[UAW SEAL]

(Effective December 11, 1970)

* * * *

FORD MOTOR COMPANY
Chicago Stamping Plant

October 29, 1967

Mr. John M. Conway, President
Local 588, UAW-AFL-CIO
21540 Cottage Grove Avenue
Chicago Heights, Illinois 60411

Improved Vending and Cafeteria Service

This is to advise that in accordance with our discussion during 1967 local negotiations, a meeting was held between representatives of the Company and Al Green Enterprises, Inc. for the purpose of improving cafeteria and vending services.

I was agreed there will be a reassignment of serving and kitchen duties to ensure additional personnel for the serving of steam table items at all times during regular lunch periods.

Additionally, assurance was given that the Cafeteria Manager or an Assistant Manager, during all lunch periods, will be stationed in the cafeteria to ensure the adequacy of food, service, condiments, silverware and utensils.

Silverware will be subjected to continuing additional inspection after washing, and in the event of a temporary shortage of personnel due to absenteeism, etc., a standby supply of clean silverware will be available to ensure an adequate supply during all feeding periods.

To provide condiments for sandwiches dispensed in the "Coke Cribs", dispensers of mustard and catsup will be installed.

It was further agreed that Al Green Enterprises, Inc. will without undue delay following the strike provide a qualified expert from its home office to study local conditions for the purpose of providing attractive "weekly specials", more varied menus and to devise means for improving cashier service.

Additionally, a vending service specialist will study the plant's vending requirements and facilities, including the added milk, pastry and ice cream machines for the purpose of recommending an improved servicing schedule and any additional manpower necessary to implement such schedules. Each vending crib will be serviced at least once a shift.

To ensure that vending machines will be given prompt servicing in the event of mechanical breakdown, an instant means of communication with the mechanic will be provided.

The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for providing the Union with a means for registering and expeditious handling of complaints concerned with such performance.

/s/ J. E. Conen, Manager
Industrial Relations Dept.

* * * *

JOINT EXHIBIT 13

February 13, 1976

Mr. Tom Brown
Industrial Relations Manager
Ford Motor Company
1000 E. Lincoln Hwy.
Chicago Heights, Ill. 60401

Dear Mr. Brown:

As the certified Bargaining Agent for your Production and Maintenance employes, Local 588 is concerned about prices and services in cafeteria and vending operations. We would like to bargain with you regarding these prices and services.

As you know this is a subject of great concern. Good food at reasonable prices is considered to be a condition of employment by our members. If we discuss this promptly, we may be able to reach full agreement prior to opening of negotiations for a new contract.

Sincerely,

RICHARD W. MARCO
Chairman
Bargaining Committee
Local 588 UAW

RWM:eb
opeiu#28

Please advise me of the time and place that such a bargaining session might take place at your very earliest convenience because of our grave concern about these matters.

JOINT EXHIBIT 14

March 23, 1976

Mr. Tom Brown
Industrial Relations Manager
Ford Motor Company
1000 E. Lincoln Highway
Chicago Heights, Illinois 60411

Dear Mr. Brown:

As you know, since my letter to you of February 13, 1976, the employees have in very large numbers refused to patronize the vending and cafeteria operations in the plant. I hope this has served to emphasize to you the importance which the employees place upon food services. As the certified bargaining agent of the employees, Local 588, is faced with several problems. First, we would like to see that the present local collective bargaining agreement is enforced. Also, we must prepare for forthcoming negotiations when this and the national collective bargaining agreement expire.

In order to satisfactorily perform these functions which must be performed pursuant to law and our responsibility to our membership, we need some additional information from you. As examples of the kinds of information we require, we would like to know what Ford provides for the vending machines and cafeteria, such as electricity, water, etc. We would like to know whether Ford assumes any maintenance responsibilities with reference to any of the cafeteria or vending machine equipment. We would like to know exactly what kind of commission or profit Ford realizes from the food operations. We would

like to know what control Ford has over prices, and what ability Ford has to terminate the "lease," contract or other rights of any food supplier. Indeed, we would like to receive copies of all written agreements between Ford and any food supplier or vending machine operator. We would also like to know if there are any oral agreements regarding food prices, quality, and services.

The effect of cafeteria and vending operations upon employe morale, productivity, and recruitment should be obvious. Will you please send us the requested information as soon as possible, and phone me to make an appointment to discuss this subject with a view to ironing out our problems under the present contract, and also with a view to our forthcoming negotiations.

Sincerely,

RICHARD W. MARCO
President and Chairman of
Bargaining Committee

RWM:eb

JOINT EXHIBIT 15

[Ford Emblem]

February 18, 1976

Metal Stamping Division
Ford Motor Company

Chicago Stamping Plant
1000 East Lincoln Highway
P.O. Box 6
Chicago Heights, Illinois 60411

Mr. R. W. Marco
President-UAW, Local #588
21540 Cottage Grove Avenue
Chicago Heights, Illinois 60411

Dear Mr. Marco:

This letter is in response to your letter dated February 13, 1976 requesting to meet with the Company for the purpose of negotiating prices and services provided by A.R.A. Food Services.

Similar requests have been made by the Union in the past, and the Company's response has been the same, that food prices and services are not a proper subject for negotiations. Appropriately, your request is denied.

/s/ T. M. Brown
T. M. BROWN
Industrial Relations Manager
Chicago Stamping Plant

JOINT EXHIBIT 19

GROUP C

The following restaurants are 3.75 miles from the hourly parking lot to the intersection of Dixie Hwy. (Ill. 1) and Sauk Trail. One severe traffic problem is the C & EI railroad crossing at Jackson Ave. on Sauk Trail. This crossing is blocked by trains more often than not and there are no restaurants in this direction until after these tracks.

1. Pizza Hut—seats 40—parks 12—typ. $3.00 (pizza, beer, spaghetti)
2. John's Rest.—seats 80—parks 12—typ. $3.00 (buffet & cocktails)
3. Valentino's—seats 60—parks 20—typ. $4.00 (luncheon)
4. Dog & Suds—seats 20—parks 40—typ. $2.00 (drive inn)
5. Brown Onion—seats 120—parks 60—typ. $4.00 (Lucheon & Cocktails)
6. McDonalds—seats 50—parks 50—typ. $2.00 (hamburgers)
7. Red Lion—seats 180—Parks 90—typ. $4.00 (luncheon & cocktails)
8. Burger King—seats 50—parks 80—typ. $2.00 (hamburgers)

GROUP B

Restaurants

Ford City (1.6 miles)—seats 37—TYP. 2.00 (Plate Lunch) Parks 15
Dairy Queen (2.8 miles)—seats 6—parks 20—TYP. 1.50 Sandwich—Ice Cream

Helen's Donut Shop (2.5 miles)—seats 40—parks 15 closes at noon

Taverns

Marion's (1.9 miles)—parks on the street—seats 30—TYP. $1.50 Sandwich
Silver Tap (2.7 miles)—parks 13—seats 24

GROUP A

Brown's Chicken (4 mi)—seats 32—parks 12—TYP. 2.00 Chicken Carryout
Taco Bell (4.5)—seats 40—parks 10—TYP. 2.00 Mexican Sandwiches
McDonalds (4.5)—seats 110—parks 85—TYP. 2.00 Hamburgers
Ponderosa (4.5)—seats 200—parks 200—TYP. $2.25 Plate
Pizza Hut (4.5)—seats 100—parks 30—TYP. $1.50 Sandwich—Pizza
Tivoli (5)—seats 300—parks 200—TYP. $4.00 (Lunch—Cocktails)
Bonanza (4.5)—seats 150—parks 140—TYP. 2.25 Plate Lunch
Village Inn (4.5)—seats 75—parks 50—TYP. $2.25 (Plate Lunch)

JOINT EXHIBIT 20

DISTANCES AND TIMES TO SHORT ORDER PLACES

Location	Mileage	Time(min.)
Sugar Shack, Bradfords BBQ on 30 west of State	1.7	5
Hickory Nut BBQ on 30 just east of East End	2.2	6
Dairy Queen on 30 and Halstead	2.4	7
J D Drive In on 30 west of Chgo Road	3.1	9
Prince Castle on 30	3.4	10
Rib Cage, Tastee Freeze, Ky Fried Chicken on 30	3.7	10½
Long Johns Pub on 30	4.0	11
Arbees Roast Beef on 30 east of Western	4.4	12
MacDonalds on Western just south of 30	4.6	13
Bozos on Halstead north of 30	2.7	11
Mornell on Halstead and Chicago north of 30	3.1	
Pizza Hut on Sauk Trail east of Chgo Rd.	3.5	
MacDonalds on Sauk Trail west of Chgo Rd.	3.6	8
Burger King on Chgo Rd south of Sauk Trail	3.6	8
Dog and Suds on Sauk Trail west of Chgo Rd	3.8	9
Bozos on Sauk Trail east of Route 394	2.5	5
Dog and Suds on Sauk Trail and Torrence in Sauk Village	3.4	7
Dairy Queen and MacDonalds on Sauk Trail and Torrence	3.5	8

All distances and times were calculated from the middle of the hourly parking lot traveling at the maximum speed limit. Time walking from the plant floor to the parking lot was not figured.

JOINT EXHIBIT 21

[Ford Emblem]

Ford Motor Company
The American Road
Dearborn, Michigan 48121

March 7, 1972

Mr. Joseph P. Simon, Vice President
ARA Services, Inc.
Independence Square, West
Philadelphia, Pennsylvania 19106

Dear Mr. Simon:

Enclosed please find your copy of the recently negotiated catering-vending agreement for our Chicago Stamping Plant. Please note that my letter of February 11, 1972, modifying this agreement, is to be filed with and made a part of this contract.

This new agreement is effective January 1, 1972 and replaces the catering-vending agreement of January 5, 1970.

Very truly yours,

/s/ Richard W. Mather
RICHARD W. MATHER, Manager
Food Services Department

RWM:og

cc Secretary's Office
R. W. Scott
J. M. Osborne
L. P. Cecchini (2)

[Ford Emblem]

Ford Motor Company
The American Road
Dearborn, Michigan 48121

February 11, 1972
Mr. Joseph P. Simon
Senior Vice President
ARA Services, Inc.
Independence Square, West
Philadelphia, Pennsylvania

Dear Mr. Simon:

ARA Services, Inc. has been operating the food and vending service at Ford's Chicago Stamping Plant under the terms of an agreement dated January 5, 1970.

On December 9, 1971, we agreed in a meeting held in my office to replace the above mentioned agreement and other similar subsidy agreements with a new standard Ford Motor Company agreement modified as necessary for each location.

The purpose of this letter is to state the following financial changes at this location:

- Paragraph 3a is amended to limit Ford's subsidy obligation to $52,000 per year except that it is understood that if Ford's plant population is reduced to less than 3,850 employes, or in the event that Ford requires Contractor to operate manual food service facilities in addition to those in existence on January 5, 1970, then in either event there shall be no limitation on the amount of the subsidy that Ford is required to pay to

Contractor as a result of Ford's guarantee to pay Contractor's costs and service fee.

- It is further agreed that in the event of a strike at Ford's premises, which lasts more than 45 days, and in the event that Ford requires Contractor to provide manual food and vending service during such strike, the fiscal provisions set forth in Paragraph 3a and Paragraph 3b of the agreement shall be suspended for the duration of the strike and, in lieu thereof, Contractor shall be entitled to receive for its services reimbursement for all direct costs (exclusive of the allowance for general administrative expenses) of the manual food service operation and the vending operation plus 9% of said direct costs to cover Contractor's general administrative expenses and service fee.

- All commissary-prepared food items such as sandwiches, salads, desserts, will be charged to the Ford location at 67% of the suggested retail sales price as listed in the latest published menu of Contractor's Chicago Commissary. This menu price list shall be updated on market conditions quarterly, and will be furnished as published to Ford. The 67% figure shall include raw food cost, labor to produce, package and ship, packaging material costs, labeling and delivery costs along with all other costs incurred in the normal business conducted by Contractor's Commissary. Thus, if the suggested price of hamburger is 35¢, the cost to be charged to the operating statements would be 23.45¢—cooked, packaged and labeled, ready for sale.

If the foregoing correctly covers the exceptions for this location, please sign a copy of this letter and return it to me. This letter becomes a part of the new agreement effective January 1, 1972, and is to be filed with it.

The signed agreement will be forwarded to you upon receipt of a copy of this letter.

Sincerely yours,

/s/ Richard W. Mather
RICHARD W. MATHER, Manager
Food Service Department

RWM:og

Concur:

ARA Services, Inc.

By /s/ Joseph P. Sims

Its Vice President

CATERING-VENDING AGREEMENT

FORD MOTOR COMPANY, a Delaware corporation with offices at The American Road, Dearborn, Michigan (hereinafter called "Ford"), hereby authorizes the undersigned Contractor, and Contractor hereby agrees to operate a manual food service and to supply and operate vending machines at the Ford location, Chicago Stamping Plant, 1000 East Lincoln Highway, Chicago Heights, Illinois upon the terms and conditions hereinafter set forth.

1. *Ford shall*:

   a. furnish at its expense and as it deems suitable, space, office equipment (one file cabinet, desks, chairs and local telephone service), cafeteria equipment (including kitchen equipment, cooking utensils, chairs, tables, counter steam tables, coffee urns, refrigeration, ice machines, china, silverware and glassware), utility outlets, and all heat, electric light, power, gas, steam, and hot and cold water required for the proper operation of said manual food service and vending machines;

   b. keep said mechanical cafeteria equipment in good mechanical condition and furnish at its expense all replacements and repair parts therefor, except as provided in Section 2i;

   c. furnish pre-employment and periodic physical examinations at those locations where Ford has a full-time medical doctor on its

rolls, and furnish courtesy first-aid treatment, where such services are available, to employes of Contractor while engaged in the operation of said manual food service and vending machines; and

d. furnish all necessary sweeping and mopping of the dining space furnished hereunder.

2. *Contractor shall*:

a. manage and operate said manual food service and install (including connecting to utility outlets), maintain and service said vending machines in the space allotted, it being understood that title to and ownership of the vending machines shall remain with the Contractor;

b. obtain all necessary permits and licenses for the conduct of the manual food service and vending machine business in its name and at its expense;

c. furnish all foods, beverages, and materials of every kind, and all management and labor necessary for the proper operation of said manual food service and vending machines;

d. furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by Ford, and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or Contractor;

e. furnish Ford a list showing the number, classification, pay rates and work schedules of personnel who operate said manual food service and vending machines;

f. furnish Ford a list showing the number, make and type of vending machines and coffee and carbonated beverage formulas;

g. operate and maintain the manual food service (including, unless excused from so doing in writing by local Ford management, sweeping and mopping of the kitchen and storeroom, cleaning of exhaust hood filters, and washing manual food service tables and chairs) and said vending machines in accordance with all laws, ordinances, regulations and rules of federal, state, and local authority and the standards of cleanliness, safety and health established by Ford; provided, however, that any structural or equipment changes necessary in order to comply with such manual food service requirements and standards shall be made by Ford at its expense;

h. operate and care for vending machines and all equipment required in the operation of said manual food service so as to keep the same in first-class condition, reasonable wear and tear excepted, and permit inspection of all such machines and equipment by persons designated by Ford at any time to permit a determination that established standards of quality and cleanliness are being met by Contractor;

i. make (and furnish to Ford) a complete inventory of all utensils, china, silverware, glassware, and equipment every six (6) months, and, at Contractor's expense, immediately replace all utensils, china, silverware, glassware, and equipment missing due to breakage, loss or theft, (replacements of chinaware, silverware, stainless steel flatware, and executive dining room glassware shall be ordered from sources designated by Ford) except that replacements or repairs of mechanical cafeteria equipment due to causes beyond the Contractor's control shall be made by Ford at its expense;

j. remove daily at its expense all garbage and refuse from the operation of cafeteria and dining room, and, upon its failure to so do, Contractor agrees to pay Ford all reasonable costs, charges, and expenses for removal of the same;

k. provide waste containers at each vending machine location, if desired by Ford;

l. have its employes examined by Ford medical doctor, or other competent medical doctor at locations where Ford does not have a full-time medical doctor on its rolls, and employ only persons who have been examined and approved by such doctor, and require all employes to submit to a medical examination each six (6) months during the course of their employment, or at shorter intervals if required by law;

m. keep said manual food service open, and maintain adequate services at such times and for such periods as shall be approved by Ford;

n. pay and discharge all taxes and/or license fees which may be levied or imposed on the business of operating said manual food service, the sale of food and beverages, and the operation of said vending machines; and

o. comply with all rules and regulations at the aforementioned Ford location and not interfere with the ordinary operation thereof.

3. *Fiscal Arrangements*

a. It is hereby agreed that Contractor receive for its services reimbursement for all direct costs of the food and vending operations at Ford's premises including an allowance for its general administrative costs equivalent to four percent (4%) of net receipts from its operation at Ford's premises together with a service fee of five percent (5%) of such receipts. Net receipts are defined as gross receipts collected, less applicable state and local sales taxes.

b. Costs for vending will include (1) cost of sales (including all product, cup, condiment and serviceware costs); (2) labor cost (including fringes and taxes) of all resident personnel; (3) equipment depreciation based on net cost of equipment on a write-off of five (5) years (net costs of equipment will

be defined as Contractor's cost of vending machines with all applicable discounts plus sales tax, freight and installation expenses); and (4) all other applicable expenses directly related to this location. All vending receipts in excess of the amount required to reimburse Contractor for its above defined cost of vending operations at Ford's premises including Contractor's allowance for general administrative costs and service fee, will be credited to the combined profit and loss statement as a reduction of any deficit from the manual food service operations on Ford's premises.

c. DISCOUNTS (VENDING AND MANUAL)

(1) Contractor shall credit to the operating statements, as a reduction of costs, all trade discounts received (either at the local level or at the corporate office) with the exception of cash discounts received for prompt payment.

4. *Accounting*

Within twenty (20) days following the close of each accounting period, Contractor shall submit to Ford three (3) copies of profit and loss statements for such period covering manual food service (Exhibit A), vending machine operations (Exhibit B), and a consolidation of food and vending service (Exhibit C). Should gross receipts be less than the sum of the cost of operation plus the service fee, Ford shall

reimburse Contractor for the deficit within twenty (20) days of invoice date. Within sixty (60) days following the close of Contractor's fiscal year (October accounting period through September accounting period), Contractor will submit to Ford the final year-end statements certified by an independent auditor acceptable to Ford, along with the check for the amount, if any, by which gross receipts for the prior year exceed Contractor's cost of operations including its service fee. One copy of each statement shall be sent to Manager, Food Services Department, Central Office Building, The American Road, Dearborn, Michigan 48121; one copy to Industrial Relations Manager, Metal Stamping Division, Rouge Office Building, 3001 Miller Road, Dearborn, Michigan 48121; and one copy to Manager, Industrial Relations Department, at the location covered by this agreement.

5. Contractor shall indemnify, defend and hold Ford harmless against any and all loss, damage and expense, or claims therefor, for injury to or illness caused any person, or damage, loss or expense to property (excepting property of Ford damaged by fire or extended coverage perils) arising out of the operation of said manual food service and vending machines and the sale of products therefrom, and for any loss, injury or illness resulting from the courtesy first-aid treatment furnished employes of Contractor, and for any loss or penalty resulting from the Contractor's violation of any law or ordinance, except that Contractor shall not be

liable for any loss, damage or expense caused by the sole act or omission of Ford.

6. Contractor shall maintain at its cost and expense, with respect to all its activities under this agreement, workmen's compensation (or employer's liability) insurance, and public liability insurance, including property damage, products liability and contractual liability, with companies acceptable to Ford and in the following minimum amounts:

Public Liability	$200,000.00 each person $500,000.00 each accident
Property Damage	$100,000.00 each accident

Contractor shall furnish Ford with certificates of insurance as evidence of such coverage.

7. Ford shall at all times have access to all space furnished hereunder for the purpose of making repairs and for sanitary, safety and fire inspections; and any recommendations or requirements of Ford relative to sanitation, safety and fire protection shall be promptly complied with by Contractor.

8. No alcoholic beverages of any kind will be stored or offered for sale by Contractor on the aforementioned Ford location.

9. Ford shall not be liable to Contractor for any loss, delay or damage caused by Ford's failure to keep said premises or cafeteria equipment in good repair, or from its failure to furnish electric light, power, gas, steam, water or other services.

10. Ford shall not be liable for any damage to food, materials, or equipment of Contractor.

11. It is understood and agreed that Contractor is an independent contractor and not an employe of Ford, and that the employes of Contractor are not employes of Ford, and Contractor agrees to pay all taxes and contributions required by law for social security, old age pensions, unemployment, or any other law or act relating to its employes.

12. Contractor shall not, without prior written consent of Ford, sublet or assign to third persons any interest under this contract, or in the operation of said manual food services and vending machines.

13. This Agreement hereby supersedes any and all prior Agreements heretofore made between the parties for operation of a manual food service and vending machines at the aforementioned Ford location.

14. The term of this contract shall commence as of January 1, 1972 and shall continue for a period of ninety (90) days and thereafter until terminated at any time at will by either party upon sixty (60) days' notice in writing to the other party. Any notice of termination shall be signed by an officer of the company originating the notice and shall be sent by registered mail, return receipt requested, to the address provided in Section 15.

15. Except as otherwise specifically provided herein, the submission or giving of all written lists, reports, inventories, statements and notices re-

ferred to herein shall be, if to Ford, to the Manager, Food Services Department, Central Office Building, The American Road, Dearborn, Michigan 48121; and if to the Contractor, to President, ARA Services, Inc., Independence Square West, Philadelphia, Pennsylvania 19106.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the 11th day of February, 1972.

FORD MOTOR COMPANY

By /s/ [Illegible]
Its Secretary

ARA SERVICES, INC.
By /s/ [Illegible]
Its Vice President

EXHIBIT A

LOCATION _____

PERIOD COVERED _____

STATEMENT OF PROFIT AND LOSS (MANUAL)

	Current Period		Year-to-Date	
	$	%	$	%
Net Sales				
Cost of Sales				
Meat, Fish & Poultry				
Dairy Products				
Bakery Goods				
Produce				
Groceries				
Beverages				
Other				
Total Food Cost				
Cost of Labor				
Salaries & Wages				
Payroll Taxes				
Insurance, Vacation & Holiday Accrual				
Other Payroll Expense				
Total Labor Cost				

STATEMENT OF PROFIT AND LOSS (MANUAL)—Continued

	Current Period		Year-to-Date	
Other Operating Expenses				
Paper Supplies				
China, Glassware & Silver Replacement				
Laundry & Cleaning Supplies				
General Insurance				
Miscellaneous Expense				
Administrative Expense	_____	____	_____	____
Total Other Expense	$_____	____%	$_____	____%
Total Operating Expense	$_____	____%	$_____	____%
Net Profit or Loss (Cr.)	$_____	____%	$_____	____%

EXHIBIT B

LOCATION _____

PERIOD COVERED _____

STATEMENT OF PROFIT AND LOSS (VENDING)

	No. of Machines	Current Period		Year-to-Date	
Gross Sales					
Hot Beverages	_____	$	%	$	%
Cold Beverages	_____				
Candy, Gum, Etc.	_____				
Cigarettes	_____				
Cigars	_____				
Milk & Juice	_____				
Ice Cream	_____				
Pastry	_____				
Hot Canned Food	_____				
Other Food	_____				
Totals	_____	$_____	____%	$_____	____%
Less Sales Tax		_____	____	_____	____
Total Net Sales		$_____	____%	$_____	____%
Cost of Sales					
Hot Beverages		$_____	____%	$_____	____%
Cold Beverages					
Candy, Gum, Etc.					
Cigarettes					
Cigars					

STATEMENT OF PROFIT AND LOSS (VENDING)—Continued

	Current Period		Year-to-Date	
Milk & Juice				
Ice Cream				
Pastry				
Hot Canned Food				
Other Food	_____	____	_____	____
Total Cost of Sales	$_____	____%	$_____	____%
Cost of Labor				
Salaries and Wages				
Payroll Taxes				
Insurance, Vacation & Holiday Accrual				
Other Payroll Expenses	_____	____	_____	____
Total Labor Cost	$_____	____%	$_____	____%
Other Operating Expenses				
Repairs & Maintenance				
Depreciation				
Supplies				
General Insurance				
Miscellaneous Expense				
Administrative Expense	_____	____	_____	____
Total Other Expense	$_____	____%	$_____	____%
Total Operating Cost	$_____	____%	$_____	____%
Net Profit or Loss (Cr.)	$_____	____%	$_____	____%

NOTE: All percentages are to be based on total net sales except individual product costs which are to be based on gross sales by product.

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EXHIBIT C

(Show Contractor Name Here)

FORD MOTOR COMPANY LOCATION _____

PERIOD COVERED _____

COMBINED STATEMENT—MANUAL AND VENDING

	Current Period		Year-to-Date	
Total Net Sales	$_____	____%	$_____	____%
Cost of Sales	_____	____	_____	____
Cost of Labor	_____	____	_____	____
Other Expenses	_____	____	_____	____
Total Operating Cost	_____	____	_____	____
Net Profit or Loss (Cr.)	_____	____	_____	____
Management Fee	_____	____	_____	____
Refund or Subsidy (Cr.)	$_____	____%	$_____	____%

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SUPREME COURT OF THE UNITED STATES

No. 77-1806

FORD MOTOR COMPANY, ETC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 10, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

No. 77-1806

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

ELINOR HADLEY STILLMAN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 571 F. 2d 993. The decision and Order of the National Labor Relations Board (Pet. App. A18-A45) are reported at 230 NLRB No. 101.

JURISDICTION

The court of appeals denied the Company's petition for rehearing *in banc* on March 23, 1978 (Pet. App. A46) and entered its judgment on April 18, 1978 (Pet. App. A47-A48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly held that the prices and service of food sold in petitioner's in-plant cafeteria and vending machine operations are mandatory subjects of bargaining under the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A49.

STATEMENT

1. Petitioner is engaged in the business of stamping automotive parts at a plant located on a site one-quarter-mile square in Chicago Heights, Illinois. The plant employs approximately 3,600 hourly-rated production employees, who work in a three-shift operation. These employees are represented by Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereafter "Local 588" or "the Union"). The International UAW is

the certified bargaining representative, and Local 588 is its local administrative component; there is no other bargaining representative in the plant (Pet. App. A32). Petitioner and the International UAW have had a series of national collective-bargaining agreements covering plant employees since approximately 1956, when the International was certified; and Local 588 and the petitioner have, in addition, negotiated a series of local agreements (Pet. App. A35-A36). The relevant national agreement ran from November 1973 until September 1976, and the relevant local agreement, from June 1974 until September 1976 (*ibid.*).

Petitioner provides its employees with two air-conditioned cafeterias and five air-conditioned vending machine areas, called "coke cribs" (Pet. App. A33). The larger cafeteria, which is open for breakfast and scheduled meal periods, seats 400 to 500 employees (*ibid.*). Vending machines located in this cafeteria area are accessible during shift changes (*ibid.*). The other cafeteria seats about 50 to 100 persons, and contains two coffee machines and twelve vending machines that dispense a variety of foods. Each "coke crib" contains vending machines dispensing a variety of foods; four of these coke cribs have a seating capacity of 40 to 50 persons and one seats 75 to 100 persons (Pet. App. A34).

The cafeteria and vending areas are serviced by ARA Services, Inc., (hereafter "ARA") pursuant to a 1972 agreement with petitioner (Pet. App. A32). Under the agreement, ARA furnishes food, machines,

management, and personnel (Pet. App. A32-A33). Section 2(d) of the contract states that ARA shall (Pet. App. A19-A20):

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by [petitioner], and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to [petitioner] and that shall be subject to review at the request of [petitioner] or [ARA].

The agreement authorizes petitioner to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness. Section 3(a) of the agreement provides that petitioner shall reimburse ARA for all direct costs of the food and vending operations and pay ARA a surcharge consisting of an allowance for general administrative costs equivalent to four percent of net receipts and a service fee of five percent of net receipts (Pet. App. A20). Should the receipts exceed ARA's costs plus the nine percent surcharge, petitioner is entitled to the excess (*ibid.*). When revenues do not meet the costs of the operation plus the surcharge, petitioner is obligated to subsidize ARA by an amount not exceeding $52,000 per year; and, at times in recent years, it has had to do so (Pet. App. A20, A33). The contract is terminable by either party upon 60 days' notice (*ibid.*).

Employees have a 30-minute lunch period plus two 22-minute breaks, and employees who work directly

on production lines are entitled to a 5-minute wash-up period before their meals (Pet. App. A34). Employees are not allowed to leave the plant building during the break periods, and it is not feasible for them to leave during the lunch period (Pet. App. A35). Only a very small number of employees (approximately 12 out of the 3,600) actually leave the plant during the lunch period (Pet. App. A20). Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate (Pet. App. A35).

Employees are permitted to bring their own food into the plant, but they may store food only in personal lockers (Pet. App. A35). The lockers are located in rooms that are ventilated but not air-conditioned, and employees have no refrigeration facilities (*ibid.*). During the summer months, when temperatures frequently range between 80 to 100 degrees, the locker rooms become hot and sticky, and employees have complained about food spoilage (*ibid.*). Petitioner has on occasion used exterminator services after the employees complained about the sanitary conditions in the locker rooms (Pet. App. A35). Food may be eaten only in the cafeterias or "coke cribs."

Although petitioner has at all times refused to bargain about the food prices ARA set with petitioner's approval, petitioner has bargained over food services. Since 1967, the local contract has included provisions dealing with vending and cafeteria services, such as the staffing of service lines and the restocking and

repair of vending machines (Pet. App. A20, A36-A39). The 1974 local agreement also states, "The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performances" (Pet. App. A38).

On February 6, 1976, petitioner informed the Union for the first time that cafeteria and vending machine prices would be increased on February 9 by an unspecified amount (Pet. App. A21, A39).[1] Petitioner refused the Union's request to discuss the increases before they were put into effect, and, on February 9, the prices were increased from 5 to 10 cents an item (*ibid.*). In response to subsequent Union requests, petitioner also refused to bargain about cafeteria and vending machine prices and services or to supply information on petitioner's role in cafeteria and vending operations sought as an aid in administering the existing contract and preparing for upcoming contract negotiations (Pet. App. A21-A22, A39).

On February 16, the Union began a boycott of the food service operations in which more than one-half of the employees participated (Pet. App. A22, A40). The cafeteria boycott ended on May 19, and the vending machine boycott ended on June 7 (Pet. App. A40). The onset of hot weather, which resulted in the spoilage of food employees brought from home,

[1] All dates hereafter refer to 1976 unless otherwise specified.

and the lack of success in reducing prices led to the cancellation of the boycott (*ibid.*).

2. The Board, reversing the administrative law judge, held that in-plant cafeteria and vending machine food prices and services are mandatory subjects of bargaining, and that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union or to supply requested information on those subjects (Pet. App. A18-A28). In reaching this conclusion, the Board adhered to a position theretofore rejected by the court below in *National Labor Relations Board* v. *Ladish Co.*, 538 F. 2d 1267 (C.A. 7). The Board observed (Pet. App. A23 n. 11), however, that "the instant case, on its facts, is in many respects a stronger case than *Ladish* * * *." It specifically noted, among others, the following factors that were present in the instant case and absent in *Ladish*: (1) petitioner's "right to review prices and its leverage of the subsidy agreement," (2) the possibility of petitioner's making a profit on the food service operation, (3) the bargaining history regarding some features of cafeteria and vending machine services, (4) the lack of a viable alternative to the in-plant food operations, given the lack of adequate facilities for storing bag lunches; and (5) the demonstration through the boycott of serious and widespread employee concern over in-plant food service and prices (*ibid.*).

The Board ordered petitioner, *inter alia*, to bargain with the Union, upon request, regarding "food

services and any changes, now in effect or hereafter made or proposed" in cafeteria or vending machine food prices, and to supply any requested information essential to collective bargaining concerning petitioner's "role in the cafeteria and vending machine operations" (Pet. App. A27).

3. The court of appeals enforced the Board's order. As had the courts in previous cases involving this issue,[2] the court of appeals rejected (Pet. App. A9) the general proposition that "in-plant cafeteria and vending machine food prices and services are necessarily" mandatory subjects of bargaining. It found (Pet. App. A14-A15), however, that the instant case was factually distinguishable from the earlier cases involving this issue in which the Board's orders had been denied enforcement, and it held (Pet. App. A13-A14) that "under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and therefore are mandatory subjects of bargaining."

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[2] *National Labor Relations Board* v. *Ladish Co., supra; National Labor Relations Board* v. *Package Machinery Co.*, 457 F. 2d 936 (C.A. 1), denying enforcement of 191 NLRB 268; *McCall Corporation* v. *National Labor Relations Board*, 432 F. 2d 187 (C.A. 4), denying enforcement of 172 NLRB 540; *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 387 F. 2d 542 (C.A. 4) (*en banc*), reversing 369 F. 2d 891, and denying enforcement of 156 NLRB 1080.

ARGUMENT

Because the decision of the court of appeals turned on the facts of this case, it does not conflict with earlier court decisions cited by petitioner (Pet. 7), which denied enforcement of Board orders issued in different factual settings. Accordingly, there is no legal issue warranting certiorari.

It is the Board's position that the prices of food served in a plant's cafeteria or vending machine facilities are an integral part of employees' daily working conditions—one of the "physical dimensions of [their] working environment." *Ladish Company*, 219 NLRB 354, 357, quoting *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 222 (Stewart, J., concurring). Such prices are therefore, in the Board's view, "conditions of employment" within the meaning of Section 8(d) of the Act, 29 U.S.C. 158(d), and mandatory subjects of bargaining.[3] As noted above (*supra*, p. 8), the courts have not agreed with this general principle.

However, prior to its adoption of this general rule regarding food services, the Board held in *Weyer-*

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[3] The Board has also pointed out that the provision of in-plant eating facilities may be considered a form of "wages" within the meaning of Section 8(d), particularly where employer subsidies of the facilities may be reflected in the prices charged for the food. *Weyerhaeuser Timber Co.*, 87 NLRB 672, 675-676. See also *Ladish Co., supra*, 219 NLRB at 358 (lower vending machine prices are "a direct tax-free benefit"). In the present case, as shown (*supra* p. 4), petitioner subsidized the food supply operations up to a limit of $52,000 per year.

haeuser Timber Co., 87 NLRB 672, that in circumstances where the employees have no adequate alternative source of meals during the workday, the employer's food prices are mandatory subjects of bargaining.[4] The court here agreed (Pet. App. A12), commenting that, "[t]he food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment." The court found that the employees here were such captive customers because there was no feasible alternative to in-plant food services.[5]

On the other hand, *Weyerhaeuser* was expressly distinguished in the cases upon which petitioner relies. For example, in *Westinghouse Electric Corporation* v. *National Labor Relations Board*, *supra*, 387 F. 2d at 548, the court noted that unlike the employees in *Weyerhaeuser*, who "were virtually captive customers" because of the remoteness of their work site, the employees in the case before it had "available alternatives." Similarly, the panels in *McCall Corporation*

[4] In *Weyerhaeuser*, the employees purchased their meals from employer-provided facilities at their isolated work locations in logging camps and a saw mill.

[5] The court upheld (Pet. App. A2-A3) the Board's findings (1) that it was not feasible for employees to leave the plant during their 30-minute lunch period, (2) that there were no mobile food vending trucks available on the plant property, and (3) that facilities for storing sack lunches were such that food spoilage resulted in the summer months. Accordingly, the court of appeals concluded (Pet. App. A15) that those potential sources of in-plant meals were not feasible alternatives.

v. *National Labor Relations Board*, *supra*, 432 F. 2d at 188, *National Labor Relations Board* v. *Package Machinery Co.*, *supra*, 457 F. 2d at 937, and *National Labor Relations Board* v. *Ladish Co.*, *supra*, 538 F. 2d at 1270, accepted the result in *Weyerhaeuser*, but found that the cases before them did not approximate the *Weyerhaeuser* fact pattern because the employees had viable alternatives to patronage of the in-plant food facilities.[6]

In sum, this case presents a narrow factual question—namely, whether there is substantial evidence to support the finding that, as in *Weyerhaeuser*, there were no feasible alternatives to use of the employer-provided facilities. That question does not warrant review by this Court.

[6] In *National Labor Relations Board* v. *Ladish, Co.*, *supra*, 538 F. 2d at 1271, the court of appeals faulted the Board for having "refuse[d] to consider" the alternative of bringing sack lunches from home. The court also noted that Member Jenkins' remarks on the subject of "brown bagging" in his concurring opinion (219 NLRB at 360 n. 36) were supported only by a citation to an arbitration decision holding that if an employer reimburses employees who eat in restaurants for the cost of their meals, it must reimburse employees who bring lunches from home for the cost of those lunches. There was no Board finding, as here, that physical conditions in the plant made sack lunches a less than feasible alternative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER, FORD MOTOR COMPANY

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BRIEF FOR PETITIONER, FORD MOTOR COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp. A1-A17)[1] is reported at 571 F.2d 993. The Decision and

1. References designated "Pet. App." are to the Appendices of the Petition for a Writ of Certiorari. References designated "A." are to the printed Single Appendix.

Order of the National Labor Relations Board and the Decision of the Administrative Law Judge (Pet. App., pp. A18-A45) are reported at 230 NLRB 716.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1978 (Pet. App., pp. A47-A48). The petition for a writ of certiorari was filed on June 21, 1978, and was granted on October 10, 1978 (A. 100). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

The principal question presented is whether the prices of cafeteria and vending machine food that is made available to employees in an industrial manufacturing plant are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act and therefore mandatory subjects of collective bargaining.

A subsidiary question is presented concerning food services provided employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. § 151, *et seq.*) are set forth in the Appendix, *infra,* pp. A1-A3).

STATEMENT

In May, 1976, the General Counsel of the National Labor Relations Board ("the Board") issued an unfair labor practice complaint against Petitioner, Ford Motor Company ("Ford") (A. 1-7). The complaint alleged that Ford had violated the National Labor Relations Act ("the Act") by refusing to bargain with Local 588, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Local 588" or "the Union"), the charging party, concerning cafeteria and vending machine food prices and food services at Ford's Chicago Stamping Plant, and by refusing to supply information concerning food prices and food services at the plant.

On December 1, 1976, an Administrative Law Judge, after hearing, issued an opinion in which he recommended that the complaint against Ford be dismissed (Pet. App., p. A45). On July 11, 1977, a three-member panel of the Board reversed the Administrative Law Judge and held that Ford had committed the violations alleged in the complaint. The Board ordered Ford, *inter alia,* to bargain with Local 588 concerning changes in food prices and concerning food services and to supply it with information concerning these matters (Pet. App., pp. A26-A27).

On February 22, 1978, the Court of Appeals denied a petition for review filed by Ford and enforced the Board's order (Pet. App., p. A17).

I. THE FACTS

A. Food Services at Ford's Chicago Stamping Plant

Ford operates an automotive parts stamping plant in Chicago Heights, Illinois, where it employs approximately 3600 hourly-rated production and maintenance employees who are represented by the Union (A. 14, 16, 25). Within the plant, there are two air-conditioned cafeterias and five air-conditioned food vending areas, known as "coke cribs," for use by such employees (A. 20, 30).

In the larger of the two cafeterias, which seats between 400 and 500 persons, hot food is served from steam tables; beverages, hot and cold food, pastries, and candy can also be purchased from vending machines situated in the cafeteria (A. 20). This cafeteria is open for breakfast and during lunch periods and shift changes, but only vending machine food can be purchased during shift changes. A smaller cafeteria, which accommodates 40 to 50 persons, is open for two of the three lunch periods occurring during the day and evening shifts (A. 30). No steam table service is available in the latter cafeteria, but approximately 12 vending machines supply hot and cold sandwiches, beverages, stews, soups, spaghetti, pastry, ice cream, and candy. The coke cribs, which have a total seating capacity of 235 to 300 persons, and in which are situated vending machines similar to those in the small cafeteria, are scattered throughout the plant (A. 30).

Since 1967, the cafeterias and coke cribs have been serviced by independent food caterers; since 1970, ARA Services ("ARA"), an independent contractor, has performed this function pursuant to a written contract with Ford (A. 28, 93).

On each shift, employees have a 30-minute lunch period and may take two 22-minute rest periods (A. 17). Although they may do so, very few employees leave the plant during their lunch periods. (A. 20-21, 52). Employees are not permitted to leave the plant during their 22-minute rest periods (A. 40).

Employees are permitted to bring their own food into the plant (A. 42). They are allowed to store the food in their personal lockers in ventilated locker rooms; but they may not bring it to the plant floor (A. 20-21). Food brought into the plant by employees may be eaten in the cafeterias or in the coke cribs (A. 42).[2]

B. The Ford-ARA Relationship

Under the applicable agreement between Ford and ARA (Jt. Exh. 21; A. 34, 81-99), the latter manages and operates the cafeterias in the Chicago Stamping Plant, and installs, maintains, and services the plant's vending machines (Jt. Exh. 21; A. 34, 86-89). ARA provides all food, beverages, and materials for the food operations, as well as the necessary management and personnel (Jt. Exh. 21; A. 34, 86-89). Ford furnishes rent-free to ARA the necessary space and all equipment other than vending machines, maintains the space and equipment, and provides all utilities for the operations (Jt. Exh. 21; A. 34, 85-86). Ford, however, retains a right to inspect the machines and equipment to determine compliance with sanitary standards (Jt. Exh. 21; A. 34, 92).

The agreement obligates ARA to:

> furnish products of quality in accordance with purchasing specifications that shall have been sub-

2. A witness for Local 588 testified that the area where employees' lockers are located is not air conditioned and, during the summer, becomes hot. This witness also testified that employees have complained about spoilage of food stored in their lockers. This testimony is discussed *infra*, pp. 31-34.

> mitted to and approved by Ford, and in accordance with a price and portion list for such manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or [ARA] (Jt. Exh. 21; A. 34, 86).

The agreement, subject to termination by either party on 60 day's notice, provides that Ford will reimburse ARA for its direct costs for the services provided, plus a surcharge equal to 9% of net receipts for administrative costs and service fees (Jt. Exh. 21; A. 34, 89, 93). If receipts exceed the reimbursable amounts, the excess is returned to Ford (Jt. Exh. 21; A. 34, 91). If receipts are less than costs plus the surcharge, Ford is required to subsidize ARA up to an annual amount not to exceed $52,000 (Jt. Exh. 21; A. 34, 82).

In recent years, food operations have resulted in a loss; and Ford has made up annual losses to ARA (A. 34).

C. Bargaining Between Ford and the Union

Since approximately 1956, Ford and the International Union have negotiated a series of collective bargaining agreements, applicable nationally, and covering employees at various Ford plants (Pet. App., pp. A35-A36). The applicable national agreement was effective from November 1973 until September 1976 (Pet. App., p. A36).[3] Ford and Local 588 have also negotiated a series of local agreements concerning local issues at the Chicago Stamping Plant (Pet. App., p. A36). The applicable local agreement ran from June 1974 until September 1976 (Pet. App., p. A36).

Ford has never bargained with either the International Union or with Local 588 concerning food prices.

3. The 1973-1976 national agreement between Ford and the International Union has not been reproduced in the printed Single Appendix. It is, however, included in the record certified to this Court.

Consequently, neither the contracts between Ford and the International Union nor the contracts between Ford and Local 588 in any way touch upon food prices (Pet. App., p. A36).

From time to time in the past, however, Ford and Local 588 have bargained and reached agreement on various aspects of in-plant food services. These agreements were evidenced by letters from Ford to Local 588 which were included in the local agreements. A letter dated October 29, 1967, and included in the 1970 local agreement, summarized discussions between Ford and the then-current caterer and stated that the caterer agreed to make a number of improvements in the food services, for example, by ensuring that adequate condiments, silverware, and utensils were available, by conducting a study of food services, and by providing for prompt servicing of vending machines in the event of a breakdown (Jt. Exh. 8; A. 22, 71-72).

The 1970 Local Agreement contained two other letters concerning food services. One, dated November 15, 1964, stated Ford's intent to install an "eating facility equipped with vending machines" in a new addition to the plant (Pet. App., p. A37). The other, dated December 11, 1970, stated that Ford would arrange for the smaller cafeteria to be open at the same time as the main cafeteria (Pet. App., p. A37).

The 1974 Local Agreement contains Ford's assurances to Local 588 that certain kinds of foods would be made available, that employees would be served "in a reasonable length of time through the main serving lines," and that arrangements would be made to ensure prompt servicing of malfunctioning vending machines (Jt. Exh. 7; A. 21, 69-70).

D. The Controversy Between Ford and Local 588

On or about February 6, 1976, ARA informed Ford that, effective February 9, 1976, it would increase the prices of certain food items sold in the cafeteria and vending areas (A. 31). On February 6, Ford advised Local 588 about the price increases, but did not specify the amounts (A. 31). Local 588 then requested Ford to delay the increases pending discussion of the matter; Ford, however, refused the request (A. 31). The price increases went into effect on February 9; most affected items were raised 5 cents and some were raised 10 cents (Pet. App., p. A. 39).

On February 13, Local 588, by letter, requested Ford to bargain about "prices and services in cafeteria and vending operations" (Jt. Exh. 13; A. 26, 74). Ford's reply, dated February 18, turned down Local 588's request, stating that "food prices and services are not a proper subject for negotiations" (Jt. Exh. 15; A. 26, 77).

On February 16, 1976, Local 588 began a boycott of the food service operations (A. 33). More than half of Local 588's members observed the boycott; most of such employees brought their lunches to the plant (A. 33, 58). The boycott continued until June 7, 1976, but did not result in a reduction of food prices (A. 50).

By letter dated March 23, 1976, Local 588 requested information from Ford concerning, among other things, Ford's maintenance responsibilities, its profits from food operations, its control of food prices, and its contractual relationship with ARA. The letter stated that the information was sought to administer existing contract provisions and to prepare for forthcoming negotiations (Jt. Exh. 14; A. 26, 75). On April 9, Ford rejected the request (A. 27).

II. THE BOARD'S DECISION AND ORDER

The Board, reversing its Administrative Law Judge, found that Ford had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with Local 588 about increases in food prices and about the food services provided its employees (Pet. App., pp. A23-24). In so finding, the Board adhered to its rulings in four prior cases[4] that "in-plant food prices are a mandatory subject of bargaining" (Pet. App., p. 22). The Board stated, without further rationale, that despite the reversal of each of such earlier Board rulings by a United States Court of Appeals, "we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining" (Pet. App., p. A23).[5] Characterizing the information requested by Local 588 as "relevant" to mandatory subjects of bargaining, the Board found further that Ford violated the Act by rejecting the Union's information request (Pet. App., pp. A24-A25).

The Board ordered Ford to bargain with Local 588, upon request, with respect to food services and any changes "now in effect or hereafter made or proposed" with respect to food prices; and, upon request, to supply Local 588 with information relating to its

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4. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), *enforcement denied*, 387 F.2d 542 (4th Cir. 1967); *McCall Corp.*, 172 NLRB 540 (1968), *enforcement denied*, 432 F.2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268 (1971), *enforcement denied*, 457 F.2d 936 (1st Cir. 1972); *Ladish Co.*, 219 NLRB 354 (1975), *enforcement denied*, 538 F.2d 1267 (7th Cir. 1976).

5. The Board rejected the reasoning of the Administrative Law Judge that the Courts of Appeals' decisions, coupled with the Board's failure to seek certiorari in the most recent of them, indicated that the Board had accepted the judicial view that in-plant food prices are not mandatory subjects of bargaining (Pet. App., pp. A23-24).

"part or role" in Ford's cafeteria and vending machine operations (Pet. App., p. A27).

III. THE COURT OF APPEALS' OPINION

The Court of Appeals, while acknowledging it was "dealing with a close question," enforced the Board's order, holding that in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and are, therefore, mandatory subjects of bargaining (Pet. App., pp. A13-A17). The Court viewed the question presented as one to be resolved by a factual analysis. On this basis, the Court distinguished this case from an earlier decision by another Seventh Circuit panel,[6] and from decisions by the First and Fourth Circuits,[7] all holding that the matter of in-plant cafeteria and vending machine prices is not a mandatory bargaining subject (Pet. App., pp. A11-17). Thus the Court regarded the following factors as controlling: Ford's retention of control over cafeteria and vending machine prices; Ford's ability to profit from food service operations; Ford's past bargaining with Local 588 over in-plant food services; the infeasibility of employees' bringing their own lunches to the plant; the boycott by Ford employees protesting Ford's action with respect to food prices and services; and the existence of but one union representing the plant employees (Pet. App., pp. A16-17).

Other than to refer to the matter in conclusionary language (Pet. App., p. A17), the Court did not

6. *N.L.R.B.* v. *Ladish Co.*, 538 F.2d 1267 (1976).

7. *N.L.R.B.* v. *Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *McCall Corp.* v. *N.L.R.B.*, 432 F.2d 187 (4th Cir. 1970); *Westinghouse Electric Corp.* v. *N.L.R.B.*, 387 F.2d 542 (4th Cir. 1967).

discuss the question of whether in-plant food services is a mandatory bargaining subject; nor did it address the question of whether Ford was legally obligated to comply with Local 588's request for information concerning food matters.

SUMMARY OF THE ARGUMENT

A. The principal question presented is whether in-plant cafeteria and vending machine prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, hence, mandatory subjects of bargaining. As established by decisions of this Court, Section 8(d) requires bargaining only as to those matters which have a significant or material effect on employees' terms and conditions of employment.

Prior to this case, in four cases, the courts of appeals uniformly rejected the Board's view that in-plant food prices are mandatory bargaining subjects. In all these cases, the courts regarded the matter as lacking sufficient significance to give rise to a bargaining obligation. Where the companies involved could not themselves establish food prices because the rendition of food services was performed by caterers, two of the courts pointed out the futility of requiring company-union bargaining; and even where the companies could set food prices or could affect them indirectly through the payment of subsidy to the caterer, the other two courts deemed such control not to be "significant." And in two such cases, where there existed a number of unions in the companies' plants with bargaining rights, the courts pointed out that mandatory bargaining with one such union would be disruptive of stable labor relations and economically wasteful.

As was also noted by two of the courts of appeals in the prior cases, the conclusion that in-plant food prices are not a mandatory subject is fully in accord with the legislative history of the Act. That history shows that Section 8(d)'s requirement of bargaining concerning "terms and conditions of employment" does not mandate bargaining of unlimited scope; nor does it require that employers and unions bargain over any subject which interests either of them. Instead, the section encompasses only a limited category of issues subject to compulsory bargaining.

The conclusion of the courts of appeal that bargaining about in-plant food prices is not mandatory also fulfills the Act's underlying purpose of ensuring and promoting industrial peace. Were bargaining to be required about food prices, which fluctuate frequently, employers and unions could be forced to endure endless rounds of bargaining negotiations; this could only be disruptive of industrial stability.

This Court has stated that compulsory bargaining is required only where the subject matter "vitally affects" the employees' terms and conditions of employment. In-plant food prices do not "vitally affect" employees' working conditions, and they are substantially different in kind and importance from matters held to be within the scope of the phrase "terms and conditions of employment." Furthermore, matters having substantially greater impact on employees than in-plant food prices have been held not to be mandatory bargaining subjects.

The conclusion that in-plant food prices are not mandatory bargaining subjects is supported by the fact that unions have available ample means of accommodating the effect of food prices on their membership, whether in the plant or elsewhere. Anticipated food price in-

creases are an element included in the periodic wage increases bargained by unions. Cost of living provisions, such as those Ford has negotiated with the International Union, also give employees protection against effects of food price changes.

Collective bargaining agreements are uniformly silent with respect to in-plant food prices, thus reflecting the fact that such prices are not considered appropriate subjects of collective bargaining.

Because in-plant food prices are not a mandatory subject of bargaining and the existing collective bargaining agreement did not touch upon food prices, Ford did not unlawfully refuse to provide information concerning food prices. The obligation to furnish information extends only to mandatory subjects and to information a union needs to enforce contractual provisions.

B. In an effort to distinguish this case from the earlier courts of appeals' decisions, the Court of Appeals relied on a number of "distinctions," all of which are either irrelevant or show the inappropriateness of bargaining. To base the obligation to bargain on the existence of such distinctions, separately or in combination, would produce great confusion and, perhaps, result in a substantial amount of litigation concerning whether the duty to bargain exists at particular plants.

That Ford might "influence prices" charged by the caterer is irrelevant, the basic inquiry being whether the food prices materially and significantly affect employees. Similarly, that Ford might possibly make a profit from the food service operations, that bargaining had occurred over food services, and that employees had boycotted the operations, all have no bearing on whether in-plant food prices have a significant or material effect on employees. Moreover, and contrary to

the Court of Appeals, Ford's role in food prices, which is limited to reviewing prices set by the caterers, shows that for Ford to bargain about food prices would not be meaningful because Ford cannot itself set food prices.

Furthermore, the Court of Appeals erroneously relied on the fact that Ford would be required to bargain with only one union. There should not be one rule for multi-union plants and a different rule for single union plants, although, of course, the existence of two or more unions in a plant makes bargaining over food prices all the more infeasible.

C. The Court of Appeals improperly enforced the Board's order that Ford bargain about "food services," The term "food services" was left undefined both by the Court of Appeals and by the Board, and nothing in the dealings between Ford and Local 588 lends meaning to the Board's order. Furthermore, the term "food services" obviously encompasses the most trifling aspects of a food service operation which can in no way be said to have a significant or material effect on employee working conditions.

ARGUMENT

I. IN-PLANT CAFETERIA AND VENDING MACHINE FOOD PRICES ARE NOT "TERMS AND CONDITIONS OF EMPLOYMENT" WITHIN THE MEANING OF SECTION 8(d) OF THE ACT.

The decision below that in-plant food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, a subject about which bargaining is required by Section 8(a)(5) is contrary to applicable legal principles and inconsistent with decided case authority and the legislative history of the Act. Moreover, bargaining about

in-plant food prices would be disruptive of industrial stability because it could force employers and unions to endure repeated rounds of negotiation by bargaining each time those prices were to be changed as a result of the frequent fluctuations in the price of various food products. The disruption that would thus result is wholly unnecessary since periodic wage negotiations between employers and unions and collectively bargained cost of living provisions provide ample means for accommodating the impact of food price increases on employees.

A. Prior Decisions of the Courts of Appeals Confirm That In-Plant Food Prices Are Not Appropriate Subjects of Mandatory Bargaining.

The question of whether in-plant food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, a subject about which bargaining is required by Section 8(a)(5) of the Act,[8] is not novel. Prior to the decision below, this question had been considered by courts of appeals on four separate occasions, including once by the Seventh Circuit, and on each occasion the court rejected the Board's view that bargaining was required regardless of the surrounding factual circumstances.[9]

8. An employer or a union may insist to impasse on its position on a mandatory subject. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

9. The Board's decisions have been premised on a variety of shifting rationales and have been marked by vigorous dissents. In the earliest case, *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), the Board held, with two members dissenting, that bargaining was required. The majority asserted that the employer had cafeteria facilities on its premises because nearby restaurant facilities were inadequate and hence, without dining facilities, the employer would be unable to attract employees. 156 NLRB at 1081. That employees could bring their lunches to work with them,

(Footnote continued on next page)

In the first case, *Westinghouse Electric Corp.* v. *N.L.R.B.*, 387 F.2d 542 (1967), the Fourth Circuit, sitting *en banc*, held that collective bargaining was not required concerning price increases in food items established by an independent contractor that operated cafeterias in the employer's plant. The Court rejected the Board's contention concerning the scope of Section 8(d), pointing out that since practically every mana-

(Footnote continued from preceding page.)
the Board majority deemed irrelevant, because "[t]he fact is that a considerable number of employees do not wish to bring their lunches from home" and were therefore "in substance and effect captive customers." 156 NLRB at 1081. Nevertheless, noting that the constant and frequently sharp fluctuation in the cost of food ingredients, the large number of individual items sold, and changes in menus made it impracticable to require consultation with a union before each change in the price of any product sold, the Board majority modified the Trial Examiner's proposed order that the employer bargain with the union *before* prices were changed and ordered bargaining *after* price changes had been made. 156 NLRB at 1081.

The dissenting Board members in *Westinghouse* noted that there were three unions in the plant and stated that "bargaining over the prices on each item of the menu by each of the three unions has the potential for extensive preemption of management and employee time." They further noted that there was no compulsion for the employees to buy their lunches in the cafeteria, and would, therefore, have left the matter of food price increases to "the voluntary action of the market place." 156 NLRB at 1083.

In *McCall Corp.*, 172 NLRB 540 (1968), the Board adopted, *pro forma*, the Trial Examiner's decision, which relied on the Board's decision in *Westinghouse*. Because enforcement of *Westinghouse* had already been denied by the Fourth Circuit, the Trial Examiner also distinguished *Westinghouse* on the ground that in the case before him the company could set food prices while in *Westinghouse* prices were set by an independent contractor. 172 NLRB at 545. Subsequently, in *Package Machinery Co.*, 191 NLRB 268 (1971), the Board adopted, again *pro forma*, the Trial Examiner's brief decision in which he found the Board's decisions in *Westinghouse* and *McCall* to be controlling.

Ladish Co., 219 NLRB 354 (1975), was decided by a two-to-one vote of a three-member Board panel. The members in the majority asserted that in-plant eating facilities served "significant management needs" by boosting morale, by increasing efficiency and pro-

(Footnote continued on next page)

gerial decision has some impact on wages, hours, or other conditions of employment, the "determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship" to these matters. 387 F.2d at 548. The Court then said (387 F.2d at 548, 550):

> The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider "vital". . . .
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> * * *
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> [I]t was not the intent of Congress in enacting the National Labor Relations Act to sweep every act by every employer within the ambit of "conditions of employment" . . . [E]quating the trifles here involved with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting "conditions of employment" is sheer nonsense.... Balanced and effective collective bargaining should be the ultimate objective. The statutory purpose may best be served by formulating and applying a reasonable concept of "conditions of

(Footnote continued from preceding page.)
ductivity, and by aiding in recruiting employees. 217 NLRB at 357. They emphasized the unavailability of alternative eating facilities, and stated that because the employer could terminate its contract with the caterer which set the food prices, bargaining would not be futile. 217 NLRB at 358, 360.

The dissenting Board member in *Ladish* noted that the only control the company had over food prices was its ability to terminate its contract with the caterer. He viewed this power as an ineffective mechanism for providing the company with the necessary leverage to control the caterer's food prices. Consequently, he regarded a bargaining order to be, in effect, an order for the company "to perform a futile act." 219 NLRB at 361. He further viewed a bargaining order with respect to food prices as requiring "meaningless and repetitive negotiations" because of the presence in the plant of seven labor organizations, only one of which was the beneficiary of the Board's bargaining order. 219 NLRB at 361-362.

> employment" in determining subjects of mandatory bargaining.

Further, the Court noted, to require bargaining about food prices would place the company in an "unfair and unenviable" position and could lead to "disagreement, dissatisfaction, strife and turmoil," because the union which had sought the bargaining order represented only about one third of the employer's employees, the remaining employees being either unrepresented or represented by two other unions. 387 F.2d at 549-550.

Finally, the Court in *Westinghouse* pointed out that because the company could not make an "enforceable contract" to change food prices, as such prices were set by the caterer and not the company, to order the latter to bargain about prices was tantamount to ordering the company "to engage in talk for the sake of going through the motions."[10] The Court characterized such bargaining as "fictional bargaining," noting that the purpose of collective bargaining is "to produce an agreement." 387 F.2d at 550.

In a subsequent case, *McCall Corp.* v. *N.L.R.B.*, 432 F.2d 187 (1970), the Fourth Circuit adhered to its *Westinghouse* decision and held that bargaining was not required even though the employer supplied the food and fixed the food prices. That the company could directly control the quality and prices of the food was deemed by the Court "not of sufficient significance to affect the result." 432 F.2d at 188.

10. In *Westinghouse*, the caterer fixed the prices subject to a contractual provision that the "quality and prices of the meals served and the hours of service thereof in said cafeteria shall at all times be reasonable." The company could enforce this provision by unilaterally terminating the contract on sixty days written notice. See *McCall Corporation* v. *N.L.R.B.*, 432 F.2d 187, 188 (4th Cir. 1970). Thus, in *Westinghouse*, as here, the employer alone did not control food prices.

The First Circuit in *N.L.R.B.* v. *Package Machinery Co.*, 457 F.2d 936 (1972), followed the Fourth Circuit decisions. There, the company utilized an independent caterer to provide food and vending machine services. The company subsidized the caterer's operations. The Court refused to enforce the Board's order requiring bargaining over the amount of the company's subsidy, saying (457 F.2d at 938):

> All [the Board] has is a demand from a union that the Company should contribute to the expenses of lunch or snacks for those who do not wish to bring their lunch from home, or to take the trouble to drive to a nearby restaurant. If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages, particularly when half of the employees do not use the company restaurant.

In *N.L.R.B.* v. *Ladish Co.*, 538 F.2d 1267 (1976),[11] the Seventh Circuit reached the same conclusion as had the First and Fourth Circuits. In *Ladish*, food was sold from in-plant vending machines owned and maintained by outside contractors. The contractors fixed the food prices. The company received a commission on the food items sold as reimbursement for providing the space, electricity and water needed to operate the machines. The company's control over prices was limited to persuasion and its ability to replace the contractor.

The majority of the company's employees in *Ladish* received a 15-minute paid lunch period. During the paid lunch period, the employees were not permitted to leave the plant. Approximately 70 percent of the employees in the charging union purchased their lunches from the vending machines; the remaining 30

11. *Ladish* and this case were decided by different panels of the Seventh Circuit.

percent brought their lunches to work. Ninety percent of the employees in the charging union utilized the vending machines for their beverages. Seven unions, including the charging union, represented the company's 4,800 employees.

The Court in *Ladish,* quoting from the Ninth Circuit's decision in *Seattle First National Bank* v. *N.L.R.B.*, 444 F.2d 30, 32-33 (1971), stated that the phrase "terms and conditions of employment" does not include every matter that might be of interest to unions or employers, but instead was limited to those matters which "materially or significantly affect terms or conditions of employment." 538 F.2d at 1269-1270. In the Court's view, vending machine prices did not so qualify. In so concluding, the Court stated that the company's power to terminate the vending machine contracts did not give the company effective power over the prices charged, and that bringing one's own lunch to the plant, or "brown bagging," was a "viable alternative" to commercial food service. 538 F.2d at 1271. Furthermore, the Court noted, because of the presence of several unions in the plant, to require bargaining "could be both disruptive of stable employee relations and economically wasteful," for the company could be compelled to engage in several rounds of negotiations and, at best, could only agree to negotiate with the vending machine owners. 538 F.2d at 1272.

In sum, prior to the decision below and in a wide variety of factual circumstances, the courts of appeals uniformly took the position that a change in in-plant food prices is not a mandatory bargaining subject. The courts regarded the matter as too insignificant to give rise to a bargaining obligation. Where, as in *Westinghouse* and *Ladish,* and like the situation in this case,

the companies could not themselves establish food prices, the courts pointed out the futility of requiring company-union bargaining; and even where, as in *McCall* and *Package Machinery,* the companies could either set food prices directly or could affect them indirectly through the payment of a subsidy to the caterer, the courts regarded such control as not "significant." The court in *Package Machinery* pointed out that whatever effect food price increases had on employees could best be accommodated through bargaining over wages. Similarly, in *Westinghouse* and *Ladish,* where a number of unions in the companies' plants exercised bargaining rights—a fact which mirrors the actual reality in numerous industrial plants and other kinds of employing entities throughout the United States—the courts pointed out that mandatory bargaining with any one such union would be both disruptive of stable labor relations and economically wasteful.

B. Legislative History Likewise Shows That Bargaining Over In-Plant Food Prices Is Not Required

As pointed out in *Westinghouse,* 381 F.2d at 546-547, and in *Ladish,* 538 F.2d at 1272, not to require bargaining about in-plant food prices is fully consistent with the relevant legislative history of Section 8(d) of the Act—history which makes it plain that not every matter which touches upon the employment relationship is a "term and condition of employment."

As originally enacted, the Wagner Act set forth no definition of the duty to bargain collectively. See *Fibreboard Corp.* v. *N.L.R.B.,* 379 U.S. 203, 220 (1964). In the 1947 revision of that Act, the House bill contained a detailed list of mandatory bargaining subjects, which did not include in-plant food prices or

services, and confined the duty to bargain to the subjects listed.[12] In the Senate, the House bill was amended, but the Senate's amendment did not set forth a definition of collective bargaining.[13] In conference between the House and Senate, the specific listing in the House bill was dropped, the Senate version was accepted, and the present language of Section 8(d) was substituted. However, the accompanying Conference Report shows that the intent of the Congress was to retain the restrictive approach of the House bill. Thus the Report stated with respect to the Senate version, and therefore with respect to the present Section 8(d), that while "this section did not prescribe a purely objective test of what constituted collective bargaining as did the House Bill, [it] had to a very substantial extent the same effect. . . ."[14]

The relevant legislative history thus shows that Section 8(d)'s requirement of bargaining concerning "terms and conditions of employment" does not mandate bargaining of unlimited scope. In *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. at 220, Mr. Justice Stewart, referring to this legislative history, thus summed up the governing principle:

12. The House bill listed the following as mandatory bargaining subjects:

> (i) Wage rates, hours of employment and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects. (H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11)(B)(vi) (1947), in 1 Legislative History of the Labor Management Relations Act, 1947, at 166-167 (G.P.O. 1948)) (hereinafter cited as "Leg. Hist.").

13. See 1 Leg. Hist. at 242-243.

14. 1 Leg. Hist. at 538.

> . . . the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act.

In prior cases, this Court has applied the latter principle by conducting a careful inquiry in each case to ascertain whether a specific subject ought to be considered a "term and condition of employment." See, for example, *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959); and *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971) where it was stated that "in each case the question [is] whether [the subject at issue] vitally affects the 'terms and conditions' of [the employees'] employment."

C. In-Plant Food Prices Do Not "Vitally" Affect Employees' Working Conditions

In-plant food prices are substantially different in kind and importance from matters previously held to be within the scope of the phrase "terms and conditions of employment." These matters include: grievance and arbitration procedures;[15] layoffs;[16] dis-

15. *Bethlehem Steel Co.*, 136 NLRB 1500, *enforcement denied on other grounds*, 320 F.2d 615 (3d Cir. 1963); *Crown Coach Corp.*, 155 NLRB 625 (1965); *N.L.R.B.* v. *Boss Mfg. Co.*, 118 F.2d 187 (7th Cir. 1941); *N.L.R.B.* v. *Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

16. *U.S. Gypsum Co.*, 94 NLRB 112 (1951), *modified*, 206 F.2d 410 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

charge;[17] workloads;[18] vacations;[19] holidays;[20] sick leave;[21] use of bulletin boards by unions;[22] change of payment from a salary base to an hourly base;[23] definition of bargaining unit work;[24] performance of bargaining unit work by supervisors;[25] seniority, promotions, and transfers;[26] compulsory retirement age;[27] union shop, checkoff, agency shop, and hiring hall;[28]

17. *See National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940); *N.L.R.B.* v. *Bachelder*, 120 F.2d 574 (7th Cir.), *cert. denied*, 314 U.S. 647 (1941).

18. *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953 (1958); *Irvington Motors, Inc.*, 147 NLRB 565 (1964), *enforced*, 343 F.2d 759 (3d Cir.), *cert. denied*, 382 U.S. 832 (1965).

19. *Great Southern Trucking Co.* v. *N.L.R.B.*, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).

20. *N.L.R.B.* v. *Sharon Hats, Inc.*, 289 F.2d 628 (5th Cir. 1961); *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); *Instrument Div., Rockwell Register Corp.*, 142 NLRB 634 (1963).

21. *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962).

22. *N.L.R.B.* v. *Proof Co.*, 242 F.2d 560 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957).

23. *General Motors Corp.*, 59 NLRB 1143 (1944), *modified*, 150 F.2d 201 (3d Cir. 1945).

24. *Almeida Bus Lines, Inc.*, 142 NLRB 445 (1963), *enforcement denied*, 333 F.2d 729 (1st Cir. 1964).

25. *Crown Coach Corp.*, 155 NLRB 625 (1965).

26. *U.S. Gypsum Co.*, 94 NLRB 112 (1951), *modified*, 206 F.2d 410 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954); *Oliver Corp.*, 162 NLRB 813 (1967); *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); *N.L.R.B.* v. *Proof Co.*, 242 F.2d 560 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957); *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962); *Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

27. *Inland Steel Co.*, 77 NLRB 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

28. *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F.2d 130 (9th Cir.), *cert. den.*, 338 U.S. 827 (1949); *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734 (1963); *Houston Chapter, Associated Gen. Contractors*, 143 NLRB 409 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. den.*, 382 U.S. 1026 (1966).

plant rules;[29] no-strike clauses;[30] subcontracting;[31] and employee safety.[32]

In contrast, in-plant food prices do not have the impact on employees as do such matters as the foregoing. Furthermore, matters having substantially greater impact on employees than in-plant food prices have been held *not* to be mandatory subjects of bargaining. Such nonmandatory subjects include: the pension benefits of retired employees;[33] fining employees who cross a picket line during a strike;[34] whether a contract will cover supervisors;[35] "interest arbitration";[36] performance bonds guaranteeing payment of employees' wages[37] or securing contract performance;[38] the requirement of a strike vote before a

29. *Murphy Diesel Co.* v. *N.L.R.B.*, 454 F.2d 303 (7th Cir. 1971); *NFL Players Ass'n* v. *N.L.R.B.*, 503 F.2d 12 (8th Cir. 1974); *Colonial Press, Inc.*, 204 NLRB 852 (1973); *Medicenter, Mid-South Hosp.*, 221 NLRB 670 (1975).

30. *Shell Oil Co.*, 77 NLRB 1306 (1948).

31. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964).

32. *N.L.R.B.* v. *Gulf Power Co.*, 384 F.2d 822, 824 (5th Cir. 1967).

33. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

34. *Universal Oil Products Corp.* v. *N.L.R.B.*, 445 F.2d 155 (7th Cir. 1971).

35. *N.L.R.B.* v. *Retail Clerks Int'l Ass'n*, 203 F.2d 165 (9th Cir. 1953), *aff'd on rehearing*, 211 F.2d 759 (9th Cir.), *cert. denied*, 348 U.S. 839 (1954); *Southern California Pipe Trades District Council 16*, 167 NLRB 1004 (1967).

36. *N.L.R.B.* v. *Columbus Printing Pressmen*, 543 F.2d 1611 (5th Cir. 1976); *Sheet Metal Workers, Local 59*, 227 NLRB 520 (1976).

37. *Lathers, Local 42*, 223 NLRB 37 (1976).

38. *Local 164, Brotherhood of Painters* v. *N.L.R.B.*, 293 F.2d 133 (D.C. Cir.), *cert. denied*, 368 U.S. 824 (1961).

strike;[39] the requirement of employee ratification of an agreement;[40] permission to use a union label;[41] contributions to industry promotion funds;[42] a compulsory code of ethics for employees with accompanying penalty provisions.[43]

An employee who purchases food from a cafeteria or vending machine located at the place of his or her employment is in essentially the same position as the employee who purchases food in a nearby public restaurant. In-plant food prices are thus at most only incidentally involved in the employment relationship and have, as the courts of appeals previously determined, at most only an insubstantial impact on employees. That this is so is borne out by the fact that part of the context of bargaining is expected increases or decreases in the various constituent parts of the employees' cost of living, which includes such items as housing, medical expenses, transportation, and food, whether it is procured in or outside the work place. See Wage and Price Standards, 43 Fed. Reg. 51938, 51940 (November 7, 1978); P. Samuelson, *Economics*, pp. 564-565 (8th Ed.). In addition, many collective bargaining agreements, including that between Ford and the International Union,[44] provide for cost-of-living adjustments tied to the Consumer Price Index,

39. *N.L.R.B.* v. *Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958).

40. *Houchens Market of Elizabeth Town, Inc.* v. *N.L.R.B.*, 375 F.2d 208 (6th Cir. 1967).

41. *Kit Mfg. Co.*, 150 NLRB 662 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966).

42. *Detroit Resilient Floor Decorators, Local 2265*, 136 NLRB 769 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963).

43. *Capital Times Co.*, 223 NLRB 651 (1976).

44. See pp. 93-97 of the 1973-1976 national agreement between Ford and International UAW, which as stated *supra*, n. 3., is part of the record before the Court in this case.

which includes food prices as one of its key components. Thus, the impact on employees of any single, or even overall, food price increase occurring in connection with in-plant feeding becomes of no greater consequence than the cost of food outside the plant.

Moreover, excluding in-plant food prices from Section 8(d) is perfectly consistent with a basic purpose underlying the Act. As the Court has often stated, and as Section 1 of the Act makes clear,[45] the Act was designed and intended to preserve and promote industrial peace and stability and to avoid labor strife. See, for example, *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236 (1938), and *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 401 (1952), the latter of which also teaches that whether a specific matter is a mandatory bargaining subject is to be measured, in part, by reference to this purpose. And that purpose would clearly be contravened, we submit, by a requirement that bargaining about in-plant food prices be mandatory. Frequent and sometimes extreme

45. Section 1 of the Act provides in pertinent part:

> . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> * * *
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

price fluctuations occur with respect to the cost of basic food items. See Handbook of Labor Statistics, 1975 Reference Edition, U.S. Department of Labor, Bureau of Labor Statistics (1975), Table 127; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1975, Table 23, pp. 96-97; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1976, Table 23, pp. 82-83; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1977, Table 23, pp. 100-101; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, October, 1978, Table 23, pp. 85-87.[46]

Given these economic circumstances, to require bargaining about in-plant food price increases would require employers and unions to engage in repeated and, indeed, endless rounds of negotiations. Moreover, and somewhat startlingly, if the employer is to fulfill his statutory duty, bargaining would also be required, on request, even where prices are to be decreased. Such bargaining, exposing the parties on a repeated basis to the pressures, distractions and, possibly, animosity in the bargaining process would be counterproductive insofar as industrial peace is concerned.[47]

46. Food price statistics for the five months preceding the price increase, based on 1967 as 100, are:

	September 1975	October 1975	November 1975	December 1975	January 1976
Cereals and bakery products	182.1	181.4	182.1	182.6	182.0
Meats, poultry, and fish	188.2	192.5	193.3	193.3	188.6
Dairy products	157.1	160.2	163.0	164.8	167.7
Fruits and vegetables	172.0	172.8	173.9	179.5	177.2
Other foods at home	181.0	181.2	182.3	184.4	183.4

47. The Board's order, which requires bargaining after a price increase, in no way avoids these concerns. Bargaining on a regular basis would still be mandated.

Finally, we point out that the conclusion that in-plant food prices should not be a mandatory bargaining subject is supported by the fact that bargaining over such matters is not a general or accepted labor-management practice. Neither the Court of Appeals nor the Board cited any evidence to show that employers and unions customarily bargain over in-plant food prices. There is no history of such bargaining in this case. Furthermore, in the standard reference collection of labor-management agreements. *Collective Bargaining (Negotiations and Contracts)*, BNA, not a single contract of the many there reproduced or summarized contains a provision either setting in-plant food prices or establishing a procedure for bargaining about such prices.

In sum, then, the Board's position that in-plant food prices are a mandatory bargaining subject was quite properly rejected by the courts of appeals which considered the issue prior to the decision below.[48]

II. THERE ARE NO FACTUAL CIRCUMSTANCES PECULIAR TO THIS CASE REQUIRING A BARGAINING ORDER WITH RESPECT TO IN-PLANT CAFETERIA AND VENDING MACHINE FOOD PRICES.

The Court of Appeals, in an effort to distinguish this case from the earlier court decisions, relied upon a number of "distinctions" which, it said, mandated bargaining. See Pet. App., pp. A14-17. Close examina-

48. As the duty to furnish information extends only to mandatory bargaining subjects and to information necessary to permit a union to discharge its representative role, and if bargaining is not mandatory with respect to in-plant food prices, it necessarily follows that Ford did not violate the Act by refusing to comply with Local 588's request for information concerning such prices. *See N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *N.L.R.B.* v. *Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *San Diego Newspaper Guild* v. *N.L.R.B.*, 548 F.2d 863 (9th Cir. 1977); *International Telephone & Telegraph Co.* v. *N.L.R.B.*, 382 F.2d 366 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968).

tion of these distinctions, however, demonstrates that they are either irrelevant to the issue of whether food prices are "terms and conditions of employment" or show the inappropriateness of bargaining over them. Furthermore, to base the obligation to bargain on such distinctions, each of which is discussed below, would produce great confusion and, perhaps, result in a substantial amount of litigation concerning whether the duty to bargain exists at particular plants.

1. *Influence over prices:* The Court of Appeals adopted the Board's statement that Ford "retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement" (Pet. App., p. A16). However, the "influence" an employer retains over food prices has properly been regarded as irrelevant by the courts of appeals in the prior decisions. Thus in *McCall Corp.* v. *N.L.R.B.*, 432 F.2d at 188, the company supplied the food and in fact established food prices. Similarly, in both *Westinghouse Electric Corp.* v. *N.L.R.B.*, 387 F.2d at 544, and *N.L.R.B.* v. *Package Machinery Co.*, 457 F.2d at 937, the companies subsidized food operations by providing rent-free space and equipment or cash.

We submit that the manner in which in-plant food prices are set should not be determinative under Section 8(d). Instead, the basic inquiry is, as explicated above, whether such prices materially and significantly affect employees' working conditions. Accordingly, in the absence of a showing of such an effect, the peculiarities of the particular agreement under which food is provided are clearly irrelevant.

Moreover, Ford lacked the power to establish food prices. See *supra*, pp. 5-6. Ford could not have made a binding agreement with Local 588 concerning specific food prices; and, as the Fourth Circuit observed in

Westinghouse, supra, 387 F.2d at 550, in such circumstances the Act does not require "fictional bargaining." *See also, N.L.R.B.* v. *Insurance Agents International Union,* 361 U.S. 477, 485 (1960).

2. *Possibility of profit*: The Court of Appeals also adopted the Board's view that it was significant that there existed "the possibility" for Ford to make a profit from the food operations (Pet. App., p. A16). Again, however, the question is the effect on employees; and whether or not Ford makes a profit is not relevant to that question. The Fourth Circuit so determined in *McCall Corp.* v. *N.L.R.B.*, 432 F.2d at 188, where the company had "direct control" over food prices, thus establishing that the making of a profit was a definite possibility. Furthermore, the fact is that Ford has not made a profit on the in-plant food service operations and, indeed, has been forced to subsidize those operations. See *supra*, p. 6.

3. *Prior Bargaining*: The prior bargaining between the parties over aspects of food services operation *other than food prices,* a factor relied upon by the Court of Appeals, is simply not relevant to whether Ford must bargain about prices. Furthermore, it flies in the face of this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. at 187 (1971), that "[b]y once bargaining and agreeing on a permissive subject, the parties . . . do not make the subject a mandatory topic of future bargaining." Thus, Ford's prior bargaining with Local 588 cannot, as a matter of law, serve to distinguish this case meaningfully.

4. *Lack of a viable alternative*: The Court of Appeals adopted the Board's conclusion that there was no "viable alternative," such as "brown bagging," to purchasing food in-plant. The record, how-

ever, lacks substantial evidence to support the Board's conclusion in this respect. For the uncontradicted record evidence shows that not only are there alternative means present in the plant, but the employees have in fact utilized those means. The record evidence regarding use of the cafeteria shows that, on the average, only about 20 to 30 percent of the employees purchase food from the cafeteria each day (Pet. App., p. A3). Thus, aside from purchases from the vending machines, those who do not do so either bring their lunches, as presumably most do, or do not choose to eat, or go outside the plant for food. Moreover, during the boycott of the in-plant food services, almost all employees brought their lunches with them, see *supra*, p. 8, or were able to obtain food from other sources. In sum, the evidence shows that it is possible for employees to bring their lunches and that many did so.

The Court of Appeals, however, accepted the Board's conclusion that testimony concerning employee complaints about food spoilage and locker room temperatures in hot weather showed that the employees had no viable alternative to purchasing food from the cafeteria or vending machines (Pet. App., pp. A16, A23).[49] Such testimony was, however, clearly hearsay.[50] Because of his disposition of the case, see

49. It is obvious, however, that if food spoilage is indeed a problem in hot weather, employees could nevertheless avoid spoilage by not bringing foods that are likely to spoil and by storing the foods they bring in thermos bottles and similar containers.

50. This testimony was as follows:

Q. Concerning the possibility of spoilage of food, Mr. Marco, have you as Union Officer received complaints, any complaints, of actual food spoilage from unit employees?

A. Yes, I have.

MR. ROONEY: Objection, Your Honor. That is all hearsay.

MR. SCHUR: It's not offered, Your Honor, necessarily to prove—

(Footnote continued on next page)

Pet. App., pp. A43-45, the Administrative Law Judge did not consider the weight or significance of this testimony; nor did the Board or the Court of Appeals, even though they apparently relied on it. The testimony stands, moreover, totally uncorroborated, and it is flatly contradicted by other evidence showing that employees had other means of obtaining food both during and after the boycott. The testimony, therefore, cannot provide substantial evidence to sustain the conclusion that alternative food sources were lacking. As this Court said in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230 (1938): "Mere uncorroborated hear-

(Footnote continued from preceding page.)

JUDGE WINKLER: It really is. On the other hand, I will take it, even though technically I see the point of your objection.

THE WITNESS: Yes, I have received complaints of spoilage, people bringing their lunch. (A. 49)

• • •

Q. (By Mr. Dube) Have you received complaints from bargaining unit employees about the locker room other than the things you have mentioned, heat and humidity?

A. We have gotten numerous complaints about cockroaches in the lockers.

Q. Have you ever seen cockroaches in the lockers yourself?

A. Yes, I have.

Q. Do you know in those cases if any food was damaged or destroyed by cockroaches?

A. Well, I recall a particular day when I went into the hourly cafeteria and sat down with four people in the lunch room, and of the four people, two of them told me they had to just throw their lunch away because when they opened their dinner bucket they found a cockroach in there.

MR. ROONEY: I object, Your Honor, to that. It's really hearsay and proves nothing.

JUDGE WINKLER: Sustained (A. 54-55).

Section 10(b) of the Act, 29 U.S.C. Section 159(b), provides that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . ." The testimony relied upon by the Board and the Court of Appeals is hearsay under Rule 801 and inadmissible under Rule 802 of the Federal Rules of Evidence, none of the exceptions contained in Rule 803 being applicable.

say or rumor does not constitute substantial evidence." *See also, N.L.R.B.* v. *Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963); *Boyle's Famous Corned Beef Co.* v. *N.L.R.B.*, 400 F.2d 154 (8th Cir. 1968).

5. *Boycott*: The Court of Appeals, again adopting the Board's view, emphasized that "labor strife" had occurred in the plant over food pricing (Pet. App., p. A16). The mere fact, however, that certain employees were disturbed enough by the price increase to boycott the food services cannot convert those prices into subjects of mandatory bargaining. As this Court held in *Pittsburgh Plate Glass, supra,* and in *Fibreboard Paper Products Corp., supra,* the Act establishes a limited list of mandatory bargaining subjects. The list cannot be expanded simply because certain employees are interested enough to undertake some form of economic action or, for that matter, file an unfair labor practice charge. If the boycott has any significance at all, it shows the availability to employees of alternative food sources.

6. *Number of unions involved*: That Ford would be obligated to bargain with only one union on food prices, a fact on which the Court of Appeals placed some reliance (Pet. App., p. A16), cannot expand the scope of the Act's mandatory bargaining requirements. Obviously, the statutory obligation to bargain does not depend on the number of unions involved, although, of course, as the courts of appeals perceived in *Westinghouse,* 387 F.2d at 549-550, and in *Ladish,* 538 F.2d at 1272, the existence of two or more unions in a plant makes bargaining over food prices all the more infeasible.

In sum, then, there is no valid basis for the Court of Appeals' conclusion that because of some factual circumstance unique to this case, Ford was required

to bargain about in-plant food prices. On the contrary, the facts of this case show that the in-plant food prices at Ford's Chicago Heights plant do not vitally affect employees' terms and conditions of employment, and that the Act's underlying purposes would not be served by such bargaining.

III. FORD WAS IMPROPERLY ORDERED TO BARGAIN ABOUT FOOD SERVICES.

The Board's order, which was enforced by the Court of Appeals, requires Ford to bargain with Local 588 "with respect to food services" (Pet. App., p. A29). However, neither the Board nor the Court in any way defined what was meant by "food services."

Thus, Ford would, under a literal reading of the Board's order, be required to bargain over trivialities which manifestly do not have a material or significant effect on employees such as, for example, whether the knives and forks be plastic or metal, whether coffee be served from a vending machine or at the cafeteria line or both. Thus, under the order as it now stands, Ford is exposed to the sanction of contempt for refusing to bargain over any matter that touches upon food services.

Moreover, nothing in the dealings between the parties lends meaning to the Board's order. Local 588's request for bargaining stated only that it was "concerned about . . . services in the cafeteria and vending operations" and "would like to bargain . . . regarding these . . . services" (Pet. App., p. A21). This unlimited and undefined request was refused by Ford; and now, without any elucidation of the scope of the bargaining that is required, Ford must necessarily comply with any bargaining request by Local 588 concerning food

services, however picayune or absurd the request might be.

Sound principles of administrative law, as well as fundamental fairness, demand that Ford be apprised with reasonable specificity of the subjects encompassed in the Board's direction that it bargain about "food services."[51] As this Court stated in *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941):

> It is obvious that the order of the Board, which when judicially confirmed the court may be called upon to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing.

The Board's order fails to meet the *Express Publishing* test; and, consequently, the Court of Appeals ought to have refused to enforce the Board's order. *See also, May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945); *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479 (1960).[52]

51. Decided Board cases only touch upon bargaining about food services and do nothing to define the scope of an appropriate bargaining order in a case such as this. In *Preston Products Corp.*, 158 NLRB 322, 329, 345 (1966), *enforced*, 392 F.2d 801 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 906 (1968), in addition to many other unfair labor practices, an employer was held to have violated Section 8(a)(1) of the Act by unilaterally improving lunch room equipment and supplies. Similarly, in *Flemming Mfg. Co.*, 119 NLRB 452 (1957), the employer was found to have violated Section 8(a)(1) by unilaterally discontinuing breaks at which employees received free coffee, milk and sugar without previously consulting with the employees' union.

52. The specific information requested by Local 588—Ford's maintenance responsibilities, profits, control of prices and contract with ARA—does not relate to food services but instead represents an attempt to determine Ford's role in food pricing.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and enforcement denied the Board's order.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

* * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect. . . .

* * * * *

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order. . . . Upon the filing of such petition, the court shall cause

notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section. . . .

FOR ARGUMENT

No. 77-1806

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 571 F.2d 993. The decision and order of the National Labor Relations Board (Pet. App. A18-A45) are reported at 230 N.L.R.B. 716.

[1] Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW—the charging party before the Board and an intervenor in the court of appeals—is also a party here.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978 (Pet. App. A47-A48) following denial of a petition for rehearing on March 23, 1978 (Pet. App. A46). The petition for a writ of certiorari was filed on June 21, 1978, and granted on October 10, 1978 (A. 100). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that prices of food and the food services provided in an employer's in-plant cafeterias and vending machines are mandatory subjects of bargaining under the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Brief for Petitioner, App. A1-A3.

STATEMENT

A. The Board's Findings of Fact [2]

1. Petitioner, Ford Motor Company ("the Company"), operates an automotive parts stamping plant on a one-quarter mile square site, in Chicago Heights,

[2] Many of the relevant facts were stipulated to by the parties (A. 14).

Illinois. The plant employs approximately 3,600 hourly-rated production employees, who work in three shifts (Pet. App. A32; A. 14-16, 18-19, 67). The sole bargaining representative of these employees is the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its administrative component Local 588 (Pet. App. A32; A. 25). The Company and the International Union have been party to a series of national collective bargaining agreements covering employees at the Company's various plants since approximately 1956, when the International was certified by the Board; Local 588 and the Company have, in addition, negotiated a series of supplementary local agreements. The relevant national agreement ran from November 1973 until September 1976, and the relevant local agreement, from June 1974 until September 1976 (Pet. App. A35-A36; A. 17-18, 21-23).

2. The Company provides its employees with two air-conditioned cafeterias and five air-conditioned vending machine areas, called "coke cribs." The main cafeteria, which seats 400 to 500 employees, is open for breakfast, scheduled meal periods, and during shift changes. Hot food from steam tables is available in this cafeteria at breakfast and the scheduled meal periods. In addition, the main cafeteria houses coin-operated vending machines that dispense beverages, hot and cold food, pastry, and candy (Pet. App. A33; A. 20). The other cafeteria, which seats approximately 50 to 100 persons, does not have a steam table and is open only during some of the scheduled

meal periods. It is equipped with two coffee machines and twelve vending machines that dispense a variety of foods. Each "coke crib" also contains a variety of vending machines and is open during all meal and rest periods. Four of these coke cribs have a seating capacity of 40 to 50 persons and one seats 75 to 100 persons (Pet. App. A34; A. 30).

Pursuant to a 1972 agreement with the Company (Pet. App. A32; A. 27-28, 81), ARA Services, Inc. ("ARA"), operates the cafeterias and coke cribs. Under this agreement, ARA furnishes food, machines, management, and personnel (Pet. App. A32-A33). Specifically, section 2(d) of the agreement provides that ARA shall (Pet. App. A19-A20; A. 86):

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by [the Company], and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to [the Company] and that shall be subject to review at the request of [the Company] or [ARA].

The agreement further authorizes the Company to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness (Pet. App. A33; A. 92).

Under section 3(a) of the agreement, the Company must reimburse ARA for all direct costs of the food and vending operations and pay ARA a nine percent

surcharge on net receipts.[3] Should the receipts exceed ARA's costs plus the nine percent surcharge, the Company is entitled to the excess (Pet. App. A20, A33; A. 89-90). Insofar as revenues do not meet the costs of the operation plus the surcharge (as has happened in recent years), the Company is obligated to subsidize ARA up to $52,000 per year (Pet. App. A20, A33; A. 34, 82). The contract is terminable by either party upon 60 days' written notice (Pet. App. A20, A33; A. 93).

All employees have a 30-minute lunch period. In addition, employees who work directly on production lines are afforded a 5-minute washup period before their meals and two 22-minute rest breaks (Pet. App. A34; A. 17). Employees are not permitted to leave the plant building during the break periods, and it is not feasible for them to do so during the short lunch period (Pet. App. A20, A35; A. 40-42). Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate (Pet. App. A20, A35; A. 42-43). Some restaurants are located within a four-mile area of the plant, but there are more than a dozen other industrial plants in the same area employing several thousand employees who also have access to those restaurants (Pet. App. A35; A. 15). Thus, a negligible number of employees

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[3] The surcharge consists of a five percent service fee and a four percent allowance for general administrative costs. Net receipts are defined as gross receipts less applicable state and local taxes (A. 89).

(no more than 12 out of 3,600) actually leave the plant during the lunch period (Pet. App. A20; A. 52).

Employees are permitted to bring food into the plant. Such food, which may be eaten only in the cafeterias or coke cribs, must be stored in the employees' lockers and not in working areas (Pet. App. A20-A21, A35; A. 20-21). However, these lockers are located in rooms that are not air-conditioned, and there are no refrigeration facilities available to employees (Pet. App. A21, A35; A. 19, 21, 45). During the summer months, when temperatures frequently range between 80 to 100 degrees, the locker rooms become hot and sticky, and employees have complained about food spoilage (Pet. App. A21, A35; A. 45-47, 49). Moreover, on occasion, the Company has used exterminator services after employees complained about unsanitary conditions in the locker rooms (Pet. App. A21, A35; A. 55, 61).

3. Although the Company has at all times refused to bargain about food prices in its in-plant eating facilities, it has negotiated over food services. Indeed, since 1967 the agreement between the Company and Local 588 has contained specific provisions concerning vending machine and cafeteria services, such as the kinds of food to be provided, the staffing of service lines, adequate cafeteria supervision, the cleanliness of utensils, the restocking and repairing of vending machines, and the provision of additional eating facilities (Pet. App. A20, A36-A39; A. 27, 62-63, 69-73). The 1974 local agreement included the following (Pet. App. A38; A. 73): "The Company

recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance."

On February 6, 1976, the Company informed Local 588 that cafeteria and vending machine prices would be increased on February 9 by an unspecified amount (Pet. App. A21, A39; A. 31). The Company refused Local 588's request to discuss the increases before they were put into effect, and, on February 9, the prices were increased from 5 to 10 cents per item (Pet. App. A21, A39; A. 31, 50). On February 13, Local President Richard Marco sent a letter to Tom Brown, the Company's industrial relations manager, requesting to bargain regarding food prices and services (Pet. App. A21, A39; A. 74). The letter further stated (Pet. App. A21; A. 74):

> As you know [food prices and services are] a subject of great concern. Good food at reasonable prices is considered to be a condition of employment by our members. If we discuss this promptly, we may be able to reach full agreement prior to opening of negotiations for a new contract.

The Company, by letter dated February 18, denied Local 588's request to bargain, stating that "food prices and services are not a proper subject for negotiations" (Pet. App. A21-A22, A39; A. 77).

On March 23, 1976, Local 588 requested information concerning the Company's role in cafeteria and vending machine operations in order to administer

the existing contract and to prepare for upcoming negotiations (Pet. App. A22, A39; A. 75-76). On April 9, the Company declined to provide the Union with the requested information and again refused to bargain about cafeteria and vending machine prices and services (Pet. App. A39; A. 27). Local 588's several subsequent requests to bargain about food prices and services were also rejected by the Company (*ibid.*).

Meanwhile, on February 16, 1976, Local 588 began a boycott of the food service operations in which substantially more than half of the employees participated (Pet. App. A22, A40; A. 33). The cafeteria boycott ended on May 19, 1976, and the vending machine boycott ended on June 7, 1976 (Pet. App. A40; A. 33). The onset of hot weather, which resulted in the spoilage of food that employees brought from home, and the lack of success in reducing prices led to the cancellation of the boycott (Pet. App. A40; A. 51-52).

B. The Board's Decision and Order

After adopting the factual findings of the administrative law judge summarized above, the Board, disagreeing with the law judge's legal conclusions, held that in-plant cafeteria and vending machine food prices and services constitute "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act ("the Act"), 29 U.S.C. 158(d). In particular, the Board found that, despite the Company's acknowledgement of its duty to bargain over at least some aspect of food services,

the Company had completely refused to bargain about both food services and food prices (Pet. App. A24). Because matters falling within the purview of Section 8(d) are subject to mandatory bargaining, the Board concluded that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to supply requested information to, or bargain with, Local 588 regarding food prices and services (Pet. App. A26).

As noted by the Board (Pet. App. A22-A24), this decision adhered to the Board's earlier decisions holding that in-plant food prices are generally a "condition of employment" within the meaning of Section 8(d) of the Act.[4] Although it reaffirmed this broader proposition, the Board also observed that "the instant case, on its facts, is in many respects a stronger case than [*N.L.R.B.* v.] *Ladish* [*Co.*]," 538 F.2d 1267 (7th Cir. 1976), which had previously been decided by the Seventh Circuit contrary to the Board's position (Pet. App. A23 n.11). The Board specifically pointed out the following factors (among others) that were present in this case and absent in *Ladish* (*ibid.*): (1) the Company's "right to review prices

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[4] *Westinghouse Electric Corp.*, 156 N.L.R.B. 1080, 1081 (1966), enf'd *sub nom. Westinghouse Electric Corp.* v. *NLRB*, 369 F.2d 891 (4th Cir. 1966), rev'd *en banc*, 387 F.2d 542 (1967); *McCall Corp.*, 172 N.L.R.B. 540 (1968), enforcement denied *sub nom. McCall Corp.* v. *NLRB*, 432 F.2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 N.L.R.B. 268 (1971), enforcement denied *sub nom. NLRB* v. *Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *Ladish Co.*, 219 N.L.R.B. 354 (1975), enforcement denied *sub nom. NLRB* v. *Ladish Co.*, 538 F.2d 1267 (7th Cir. 1976).

and its leverage of the subsidy agreement," (2) the possibility of the Company's making a profit on the food service operation, (3) the history of bargaining about some features of cafeteria and vending machine services, (4) the lack of a viable alternative to the in-plant food facilities, and (5) substantial and serious employee concern over in-plant food services and prices as evidenced by the widespread boycott.

The Board ordered the Company, *inter alia*, to bargain with Local 588 upon request "with respect to food services and any changes, now in effect or hereafter made or proposed, in food prices charged employees in the vending machines and cafeterias," and to supply Local 588 "with information necessary for collective-bargaining, in relation to its part or role in the cafeteria and vending machine operations" (Pet. App. A27). In accordance with *Westinghouse Electric Corp.*, 156 N.L.R.B. 1080, 1081 (1966), enf'd *sub nom. Westinghouse Electric Corp.* v. *NLRB*, 369 F.2d 891 (4th Cir. 1966), rev'd *en banc*, 387 F.2d 542 (1967), this order did not require the Company "'to bargain about every proposed price change in food prices before putting such change in effect,' [but rather] * * * to bargain on such price change[s] only after they are determined unilaterally and upon a request of the Union" (Pet. App. A25).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's order (Pet. App. A1-A17). Although it rejected the general proposition that "in-plant cafeteria and vending machine food prices and services are necessarily" mandatory subjects of bargaining (Pet. App. A9), the court of appeals held "that under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and therefore are mandatory subjects of bargaining" (Pet. App. A13-A14). On that basis, the court distinguished other cases in which it and other courts of appeals had denied enforcement of Board orders requiring bargaining about in-plant food prices (Pet. App. A14-A17).[5]

SUMMARY OF ARGUMENT

The price of food and the food services that are available to employees at in-plant eating facilities are subjects about which the National Labor Relations Act requires employers and representatives of their employees to bargain collectively. Sections 8(d), 8(a)(5) and 9(a) impose a duty upon an employer to bargain about "terms and conditions of employment." Since that phrase, which is found in Section 8(d), encompasses "the various physical dimensions of [an employee's] working environment," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring), all substantial aspects of in-plant eating facilities, including food prices, fall well within the ordinary meaning of Section 8(d).

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[5] See note 4, *supra*.

Petitioner's attempt to minimize the importance to employees of in-plant food prices is both factually inapplicable and legally erroneous. In light of an employee's need for food and drink during the course of an eight-hour work day, the Board, whose determination of the scope of Section 8(d) is entitled to great deference, has consistently found that the availability of in-plant food at reasonable prices is an important aspect of an employee's working environment. That conclusion is especially warranted in the instant case where the Company's employees of necessity eat in petitioner's in-plant facilities. Moreover, the Company's employees felt sufficiently aggrieved by the raising of food prices here that they engaged in a large-scale boycott for several months.

Furthermore, an employer cannot avoid mandatory bargaining over the "terms and conditions of employment" merely because the particular terms or conditions may be subject to seemingly minor changes that can otherwise be compensated for. Any change in a company-sponsored health insurance program, for example, is subject to mandatory bargaining on request. An employer's obligation to bargain about in-plant food prices and services is similarly comprehensive, but, as the Board's order reflects, this does not mean that the Company ordinarily will have to bargain about insignificant matters. Instead, it has been ordered to bargain only if the Union so requests following the Company's making of unilateral changes in food prices. Such subjects can also be dealt with in a comprehensive manner in collective agreements.

Common industrial practice is consistent with the Board's conclusion that the prices of food and food services available to employees in an in-plant eating facility are mandatory subjects of bargaining. Many collective bargaining agreements have explicit or implicit provisions concerning food services and prices in in-plant eating facilities. Indeed, since 1967 the Company and Local 588 have included many detailed provisions regarding in-plant food services in their collective bargaining agreement. In addition, management often considers subsidized in-plant facilities, such as those at issue here, to be a major benefit for both employees and employers.

Both the legislative history and the policies of the National Labor Relations Act strongly support the Board's determination here that Congress intended to subject a large spectrum of matters to mandatory bargaining by using the broad phrase "terms and conditions of employment." In keeping with this Court's decisions, the Board in applying Section 8(d) has remained faithful to the Act's strong policy in favor of collective bargaining as a means of resolving industrial disputes. Indeed, the potential for industrial strife arising out of in-plant food facility disputes is highlighted by the wide scale food boycott that occurred here. Concomitantly, in-plant food services and prices do not involve "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, 379 U.S. at 223.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT PRICES OF FOOD AND THE FOOD SERVICES PROVIDED IN AN EMPLOYER'S IN-PLANT FOOD FACILITIES FOR ITS EMPLOYEES ARE MANDATORY SUBJECTS OF BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT

A. The Board Has Correctly Found That In-Plant Food Prices and Services Fall Well Within the Ordinary Meaning of "Terms and Conditions of Employment"

1. As originally enacted, the National Labor Relations Act did not directly specify the subjects about which employers and unions must bargain. Section 8(a)(5) of the Act, now codified at 29 U.S.C. 158 (a)(5), simply declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 49 Stat. 453. Section 9(a), in turn, provides that a union selected by a majority of the bargaining unit shall be the collective bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Ibid.* (now codified at 29 U.S.C. 159(a)).

Section 8(d) of the Act, which is the focal point of this case, was added to the Act in 1947 by the Taft-Hartley Amendments. 61 Stat. 142 (now codified at 29 U.S.C. 158(d)). This provision, using language essentially parallel to that found in Section 9(a), made explicit what was implicit in the original Act:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

Read together, the foregoing provisions of the Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment * * *.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bargain * * *." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

2. This case primarily involves the construction and application of the phrase "terms and conditions of employment" as used in Section 8(d). The broad language of that provision encompasses, at a minimum, all "issues that settle an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Accord, *NLRB* v. *Wooster Division of Borg-Warner Corp.*, *supra*, 356 U.S. at 350; *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 294 (1959). While the sweep of Section 8(d) is not unlimited, certainly "the various physical dimensions of [an employee's] working environment" constitute "terms and conditions of employment." *Fibreboard Paper Products*

Corp. v. *NLRB*, *supra*, 379 U.S. at 222 (Stewart, J., concurring).

Although it acknowledges that many aspects of in-plant food services are covered by Section 8(d) (Pet. App. A20, A36-A37; A. 27, 62-63, 69-73),[6] petitioner nonetheless contends that in-plant food prices are not mandatory subjects of labor-management negotiations. But no employee can be expected to work a full eight-hour day without stopping to eat. Given the necessity of eating, food availability is no less germane to the employees' working environment than plant air temperature and quality, restroom privileges and conditions, or employee rental of company-owned housing—all of which are subject to mandatory bargaining.[7] For that reason, manage-

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[6] The concession is well warranted. The Company, as is common for many employers in many different industries, has bargained about many aspects of its in-plant food services since 1967 (*e.g.*, Pet. App. A20, A36-A37). See, *e.g.*, BNA, 2 *Collective Bargaining (Negotiations and Contracts)* 95:421-424, 441-444 (1978). In addition, the courts of appeals have uniformly found such matters to constitute "terms and conditions of employment." See, *e.g.*, *NLRB* v. *Ladish Co.*, *supra*, 538 F.2d at 1272; *International Union, UAW* v. *NLRB*, 392 F.2d 801, 804, 806 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968); *Inland Steel* v. *NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied in relevant part, 336 U.S. 960 (1949), aff'd on other grounds *sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950). See also *Bralco Metals, Inc.*, 214 N.L.R.B. 143, 146-150 (1974); *Hasty Print, Inc., d/b/a Walker Color Graphics*, 227 N.L.R.B. 455, 461 (1976).

[7] See, *e.g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) (air temperature); Comment, *A Case for Air Pollution as a Mandatory Bargaining Subject*, 51 Ore. L. Rev. 223 (1971); *American Smelting and Refining Co.* v. *NLRB*, 406 F.2d 552 (9th Cir.), cert. denied, 395 U.S. 935 (1969) (company housing); *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953) (company housing); *Pennco, Inc.*, 212 N.L.R.B. 677, 682-683 (1974), and *Preston Products Co.*, 158 N.L.R.B. 322, 344-345 (1966), aff'd in relevant part, 392 F.2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968) (restrooms). See also *NLRB* v. *Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967) (safety and health rules); *S.S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1229-1230 (6th Cir. 1969) (employee dress and smoking); *Bralco Metals, Inc.*, 214 N.L.R.B. 143, 146-150 (1974) (personal telephone calls).

ment must bargain about meal hours and coffee breaks even if no in-plant facilities exist.[8] And where, as here, the employer has chosen to establish in-plant eating facilities for the employee's use, the employer must also bargain about all aspects of the use of those facilities, and the services provided in them, including improvement in lunchroom equipment and supplies,[9] coffee break scheduling and service of free coffee,[10] free meal policy,[11] cancellation of catering truck

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[8] See, *e.g.*, *Fibreboard*, *supra*, 379 U.S. at 222; *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *NLRB* v. *Ladish Co.*, *supra*, 538 F.2d at 1272; *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *D & C Textile Corp.*, 189 N.L.R.B. 769, 771, 783 (1971); *Fleming Manufacturing Co.*, 119 N.L.R.B. 452, 455 (1957).

[9] *Preston Products Co.*, 158 N.L.R.B. 322 (1966), aff'd in relevant part, 392 F.2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968).

[10] *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *Fleming Manufacturing Co.*, 119 N.L.R.B. 452 (1957).

[11] *O'Land, Inc., d/b/a Ramada Inn South*, 206 N.L.R.B. 210, 214-215 (1973).

service,[12] meal areas,[13] cleanup of lunchroom areas by employees [14] and, we submit, the prices of the food served.

Petitioner is not in the business of selling food to its employees, and it cannot realistically be claimed that in-plant food prices involve "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard, supra,* 379 U.S. at 223 (Stewart, J., concurring). Rather, those prices, like the economic aspects of employee use of other in-plant facilities—such as fees or charges, if any, for lockers, pay toilets, or parking accommodations—are as much a subject of the mandatory bargaining obligation as their physical attributes. It is, after all, especially with respect to economic disputes between labor and management that the Act was intended to substitute the bargaining process for work disruptions that might otherwise ensue (see point C, *infra*).

In addition, the right to negotiate about in-plant food services could be rendered nugatory if the employees' representatives were unable to discuss the price of the food that is provided. For example, negotiations over the cleanliness and variety of selections available at an in-plant cafeteria would not be meaningful if the employer were free unilaterally to raise cafeteria prices to prohibitively expensive levels

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[12] *Bralco Metals, Inc.,* 214 N.L.R.B. 143, 146-150 (1974).

[13] *Hasty Print, Inc., d/b/a Walker Color Graphics,* 227 N.L.R.B. 455, 461 (1976).

[14] *Cosmo Graphics, Inc.,* 217 N.L.R.B. 1061 (1975).

without any obligation subsequently to bargain about the price in good faith at the union's request. In sum, it is whether desirable in-plant food is available at reasonable prices that constitutes a condition or term of employment.[15]

3. Petitioner attempts to avoid the plain thrust of Section 8(d) by belittling the importance of in-plant food prices to employees. Even if petitioner's characterization of this issue is correct, however, the Company must still bargain over changes in food prices if the employees' bargaining representative so desires.[16] While an employer's decision to raise the

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[15] Ordinarily, when a matter is subject to mandatory bargaining, all of its facets are subject to negotiation. For example, mandatory bargaining over health insurance involves not only whether insurance will be provided, but also the extent, cost of coverage, and any other pertinent matter affecting employee benefits. See, *e.g., Bastian-Blessing, Div. of Golconda Corp.* v. *NLRB,* 474 F.2d 49, 54 (6th Cir. 1973); *Oil, Chemical & Atomic Workers Int'l Union* v. *NLRB,* 547 F.2d 575, 582 & n.6 (D.C. Cir. 1977).

[16] Since the Board's order allows the Company unilaterally to effect price changes and those changes will result in labor-management bargaining only if the union subsequently requests to negotiate, truly *de minimis* matters presumably will not have to be discussed. Furthermore, an employer and union could structure their bargaining relationships regarding food prices to avoid repeated negotiations by, for example, placing a ceiling on price increases allowable during a particular time period. Petitioner's assertion that the Board's position will lead to "endless rounds of negotiation" (Br. 28) is thus baseless. In any event, the Act reflects Congress's judgment that negotiations are preferred to industrial strife and that the latter may arise from seemingly minor complaints about a condition of employment as well as from a major issue such as wages.

annual employee contribution to the cost of health insurance by a few cents would only marginally affect the employees, it is beyond cavil that such a decision is subject to mandatory bargaining. Similarly, the fact that the increased cost of in-plant food or health insurance could be offset by an increase in wages or a cost of living adjustment clause does not place those terms or conditions of employment beyond the purview of Section 8(d). In short, that a term or condition of employment is subject to minor changes that are arguably compensable by increased wages does not somehow erase the duty to bargain.[17]

Furthermore, petitioner's characterization of the importance of in-plant food prices is inaccurate. A small increase in food prices is substantial when viewed over a period of time. For example, if the price of all food items provided in an in-plant food facility were increased by ten cents, a worker who purchases an average of four items per day (such as one or two beverages and two or three food items in an eight-hour work day) would pay an additional eight dollars for food in a month with 20 work days and an additional $88 in a year in which he worked 220 days. These figures are comparable to an increase of eight dollars per month in employee health cost payments or the cessation of a regular $75-$100

[17] Nor is there merit in petitioner's assertion (Br. at 26) that an increase in the prices of food available in its in-plant facilities is no different from an increase in prices at the local food store. Health insurance is also available outside of the employment relationship, but an increase in the cost to employees of employer-supplied insurance is clearly subject to mandatory bargaining.

Christmas bonus—matters that are clearly subject to mandatory bargaining. *E.g.*, *NLRB* v. *Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964); *NLRB* v. *Niles-Bement-Pond Co.*, 199 F.2d 713 (2d Cir. 1952); *W. W. Cross & Co.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949).[18]

Petitioner also seeks (Br. 31-32) to avoid the plain terms of Section 8(d) on the ground that the existence of an alternative ("brown bagging") to the cafeterias and coke cribs precludes classifying in-plant food prices as a term or condition of employment. This contention is both factually inapplicable and legally erroneous. Both the Board and the court of appeals found that "brown bagging" was not a viable alternative because the employees' lockers were often too hot and occasionally vermin infested (Pet. App. A16-A17, A23 n.11). Such a concurrent factual finding is ordinarily not reviewed by this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, not every member of a bargaining unit must avail himself of a benefit in order for that benefit to be a mandatory subject

[18] The effect of in-plant price increases is particularly apparent in the instant case. Since virtually all employees must eat in the in-plant facilities and since the employees' lockers are often unsuited to the storage of food, the Company has a captive market. The importance of in-plant food prices is further reflected in the mass employee boycott that occurred here. Indeed, as a general matter, in-plant food prices and services may well be of intense interest to employees who value highly the scheduled breaks from what may otherwise be a dull work routine.

of bargaining. See, *e.g.*, *Richfield Oil Corp.*, 110 N.L.R.B. 356 (1954), enf'd, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956) (optional stock purchase plan); *NLRB* v. *Lehigh Portland Cement Co.*, 205 F.2d 821, 823 (4th Cir. 1953) (only 25% of employees rented employer housing).[19]

4. In light of the important role of readily available in-plant food services at reasonable prices in the overall working environment of employees, the Board and the court of appeals correctly concluded that petitioner had violated Section 8(a)(5) by refusing to bargain.[20] The Board's determination that in-plant food prices and services are terms and conditions of employment adheres to more than ten years of consistent precedent.[21] Because the "classification of bar-

[19] The *Amicus Curiae* Brief On Behalf of the National Automatic Merchandising Association suggests that the Board's decision unduly interferes with the third party relationship between the employer and the independent in-plant food facility managers and suppliers. In this case, however, the Company retained the power to control and review food services and prices. Where the employer does not have such explicit power, he can nonetheless seek to affect prices by, *inter alia*, initiating or increasing a subsidy to the food caterer. We further note that many employee benefits, such as health insurance, involve third-party suppliers.

[20] As previously indicated, the Board found (and the court of appeals agreed) that the Company had refused to negotiate about both food services and food prices (Pet. App. A24; see Pet. App. A21-A22, A39; A. 77).

[21] In addition to the authorities cited in note 4, *supra*, see also *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949); *O'Land, Inc., d/b/a Ramada Inn South*, 206 N.L.R.B. 210, 215-216 (1973); *Missourian Publishing Co.*, 216 N.L.R.B. 175, 180 (1975); *Florida Steel Corp.*, 231 N.L.R.B. 923 (1977).

gaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise," *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965), the Board's determination here is entitled to great deference. Cf. *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302-304 (1977).[22]

B. Established Industrial Practices Show That In-Plant Food Services and Prices are "Terms and Conditions of Employment"

This Court has repeatedly approved the propriety of looking to industrial practices as an aid in determining the scope of Section 8(d). See, *e.g.*, *Fibreboard, supra*, 379 U.S. at 203. The inclusion of provisions relating to in-plant food services and prices in collective bargaining agreements is a widespread practice in a substantial range of industries. See

[22] Although we argue primarily that in-plant food prices are "terms and conditions of employment," we submit that such matters are also "wages" within the purview of Section 8(d). In *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672, 676 (1949), the Board held that meals served to employees at a remote timber camp constituted "wages" (as well as "conditions of employment"). The Board reasoned that the meals represented an "emolument of value" to the employees because they saved both on the cost of transportation to obtain food and on the cost of the food itself since the meals were sold below cost. Cf. *W. W. Cross & Co., Inc.* v. *NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). The same analysis applies to food services furnished by, and at, an industrial plant. As highlighted by the facts of this case, the in-plant meals represent "emoluments of value" in terms of transportation expenses, insofar as alternative sources of food are relatively distant, and meal costs, insofar as the Company has subsidized ARA.

BNA, 2 *Collective Bargaining (Negotiations and Contracts)* 95:421-424, 441-444 (1978);[23] see also note 24, *infra*. Indeed, since 1967 the local agreements between petitioner and Local 588 have contained detailed provisions regarding in-plant food services (Pet. App. A20, A36-A39; A. 27, 62-63, 69-73). In addition, numerous arbitration decisions have construed collective bargaining agreements to cover the cost of employer-supplied food as a condition of employment.[24]

That management commonly considers the provision of in-plant food to be "one of the most important

[23] As petitioner points out (Br. at 29), none of the few sample clauses from collective bargaining agreements reproduced in this study refer to in-plant food prices directly, although several refer to the distribution of canteen profits to the union. Such clauses apparently exist, however, see S. Torff, *Collective Bargaining: Negotiations and Agreements* 279 (1953), especially in unpublished local agreements. Moreover, the duty of management to negotiate about at least some aspects of food services (which petitioner has conceded, Pet. App. A24) confirms the duty to negotiate over food prices. The right to negotiate over food services can be rendered illusory if management can raise prices at will. It is whether desirable food is available at reasonable prices that constitutes a condition of employment.

[24] See, *e.g.*, *Universal Form Clamp Co.*, 68 Lab. Arb. Rep. 1223 (Miller, 1977) (cost of coffee); *Hilton Hotels Corp.*, 42 Lab. Arb. Rep. 1267, 1270-1272 (Hanlon, 1964) (cost and type of meals); *Greater Los Angeles Zoo Ass'n*, 60 Lab. Arb. Rep. 838 (Christopher, 1973) (employer may not discontinue practice of providing free meals to zoo food vendors when contract provided that there would be no reduction of employee benefits); *Alpena General Hospital*, 50 Lab. Arb. Rep. 48 (Jones, 1967), and *Lutheran Medical Center*, 44 Lab. Arb. Rep. 107 (Wolf, 1964) (free meals are working condition).

employee benefits" further evidences the correctness of the Board's determination here.[25] In addition to being a convenient mechanism for supplying necessary meals while allowing employees to fraternize with their fellow workers,[26] in-plant food services are considered by management to benefit employees in numerous other ways such as providing better nutrition and nutrition education.[27] Such employee benefits are enhanced by the availability of reasonable, or subsidized, meals.[28] Management, in turn, also derives a number of advantages from in-plant food facilities: increased employee morale and productivity, reduced employee absenteeism and tardiness, the ability to schedule shorter lunch hours and coffee breaks, and the greater ability to recruit new employees.[29]

[25] Fisher, *Operating Your Firm's Dining Area Profitably*, 27 Administrative Management 66-67 (Oct. 1966).

[26] See Scheer, *The Company Cafeteria*, 45 Personnel Journal 85-86 (1966).

[27] See W. Waite, *Personnel Administration* 578 (1952); T. Toedt, L. Lovejoy, R. Story and D. Shainin, *Managing Manpower in the Industrial Environment* 550 (1962).

[28] See Scheer, *The Company Cafeteria, supra;* J. Mee, *Personnel Handbook* 577-579 (1951); T. Toedt, L. Lovejoy, R. Story and D. Shainan, *Managing Manpower, supra*, at 548-550; *Lunching at the Office: Four Plans*, 28 Administrative Management 32 (1967). See also *Westinghouse Electric Corp.* v. *NLRB, supra*, 369 F.2d at 894.

[29] See, *e.g.*, Dana, *In-House Food Services Can Increase Morale and Productivity*, 52 Personnel Journal 50-53 (1973); BNA, *Labor Policy and Practice Series (Personnel Management)*, 241:16 (1978); *McCall Corporation, supra*, 172 N.L.R.B. at 546 n.30. See also notes 25-28, *supra*.

Thus, many employers choose to provide in-plant food services for their employees, and a substantial portion of these food operations are employer-subsidized.[30] These in-plant facilities are both an integral part of the employees' working environment and a significant employee benefit. In light of the common industrial practice of providing for, and bargaining about, such food operations, the Board has reasonably concluded that in-plant food prices and services are conditions and terms of employment.

C. The Legislative History and Statutory Purposes of the National Labor Relations Act Support the Board's Conclusion That In-Plant Food Prices Are Subject to Mandatory Bargaining

1. The relevant legislative history indicates that in enacting Section 8(d) Congress intended to sub-

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[30] Petitioner is contractually obligated to subsidize ARA up to $52,000 per year, which it has done in recent years (Pet. App. A20, A33; A. 34, 82). Moreover, a recent survey conducted through the Bureau of National Affairs' Personnel Policies Forum showed that 54 percent of the responding companies provided food services using a lunchroom with vending machines; 43% of the companies provided employee cafeterias, and 15% provided vending machines with snack bar service. BNA, *Labor Policy and Practice Series, supra*, at 245: 201-204. Surveys published by the National Industrial Conference Board in 1964 showed that 47% of the manufacturing companies that responded provided cafeteria services, and 55% of the companies with cafeterias subsidized the operation. Only 8% of the companies reported that they were trying to operate the cafeterias at a profit. NICB, *Personnel Practices in Factory and Office: Manufacturing*, Personnel Policy Study No. 194 at 76-77 (1964). For data on food services in nonmanufacturing companies, see NICB, *Office Personnel Practices: Nonmanufacturing*, Personnel Policy Study No. 197 (1965).

ject a wide range of matters to mandatory bargaining. The original House bill had sought to curtail the scope of labor-management negotiations by specifically listing the limited topics subject to mandatory bargaining. H.R. 3020, 80th Cong., 1st Sess., § 2(11) (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 22-23, 49 (1947). However, the Senate, guided by the comments of then NLRB Chairman Paul Herzog,[31] adopted the broader and more general language now found in Section 8(d), thereby deferring to the Board's expertise in these matters.

In conference, the House's attempt to "straight jacket[]" and "limit narrowly the subject matters appropriate for collective bargaining," H.R. Rep. No. 245, *supra*, at 71 (Minority Report authored by then Rep. John F. Kennedy), was rejected in favor of the Senate version. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 8, 34 (1947); 93 Cong. Rec. 6444 (1947) (summary report of Sen. Taft); *id.* at 6529 (remarks of Sen. Kilgore).[32] Congress thus apparently foresaw that the scope of collective bargaining

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[31] See *Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 1914 (1947).

[32] The Company claims (Br. 22) that, despite the broad language of Section 8(d) as enacted, Congress intended to retain the restrictive approach of the House bill. But, as Mr. Justice Stewart has pointed out, the isolated language in the House Conference Report that petitioner relies upon refers to the similarity between the two bills in terms of collective bargaining procedures, not the scope of collective bargaining. *Fibreboard, supra*, 379 U.S. at 221 n.5 (concurring opinion).

might "vary with changes in industrial structure and practice," and therefore chose to leave the precise details of what constituted a term or condition of employment to the discretion of the Board. See *Hearings Before the Senate Comm. on Labor*, note 31, *supra*. Here, the Board, consistently with this legislative history, has reasonably concluded that in-plant food prices and services are mandatory subjects of bargaining.

2. Similarly, the Board's determination here effectuates a primary policy of the National Labor Relations Act. The Act's sponsors recognized that refusals to bargain and negotiate had been a major cause of industrial strife. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937). Thus, a principal purpose of the Act is to promote the peaceful settlement of industrial disputes and labor-management controversies through the collective bargaining process. See *Fibreboard, supra*, 379 U.S. at 211; Section 1(b) of the Act, 29 U.S.C. 151(b). As Judge Craven, writing for the panel in *Westinghouse Electric Corp.* v. *NLRB*, *supra*, 369 F.2d at 895, stated:

> The underlying philosophy of the Labor Act is that discussion of issues between labor and management serves as a valuable prophylactic by removing grievances, real or fancied, and tends to improve and stabilize labor relations. Experience teaches that major work interruptions may spring from seemingly trivial causes.

The Board's inclusion of in-plant food prices and services within the statutory scope of mandatory

bargaining thus effectuates the policies of the Act. As epitomized by the large-scale boycott involved in this case, relegating disputes over in-plant food matters to the collective bargaining process serves to bring "a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." *Fibreboard, supra.*

While petitioner contends (Br. 27-28) that the policies of the Act do not require in-plant food prices to be a topic of mandatory bargaining, it acknowledges that it must bargain over the inextricably interlinked issue of food services.[33] Indeed, since 1967 the collective bargaining agreements between petitioner and Local 588 have contained various detailed provisions concerning the in-plant food services (Pet. App. A20, A36-A37; A. 27, 62-63, 69-73), and petitioner does not claim that the negotiations underlying those provisions were either unduly burdensome or interfered with "managerial decisions, which lie at the core of entrepreneurial control." *Fibreboard,*

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[33] With respect to food services, petitioner merely contends (Br. 35-36) that the Board's order does not define with reasonable specificity the food service matters on which bargaining is required. Since petitioner did not raise this issue before the Board or the court of appeals—contending only that it did not refuse to bargain about food services—it is foreclosed from raising it here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the elements of the term "food services" have already largely been defined by the Company's prior bargaining and by the Board and court decisions on this subject. See notes 9-14, *supra*. The content of the term can be further fleshed out in the course of subsequent negotiations with Local 588.

supra, 379 U.S. at 223. Rather, given the importance of in-plant food matters to the working environment of employees[34] and the interlocked nature of food services and food prices,[35] the Board's determination below properly furthers the statutory policy of avoiding industrial strife by means of labor-management negotiations.

D. The Board's Determination That In-Plant Food Prices Are "Terms and Conditions of Employment" is Consistent With This Court's Prior Decisions

Although this Court has never directly addressed the issue whether in-plant food matters are mandatory subjects of bargaining, an analysis of the Court's most relevant decisions supports the propriety of the Board's conclusion here. In a concurring opinion in *Fibreboard*, *supra*, three Justices stated that Section 8(d) at least includes "the various physical dimensions of [an employee's] working environment."

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[34] In-plant facilities generally have a substantial impact upon the employees' working environment. See, *e.g.*, *Ladish Co.*, *supra*, 219 N.L.R.B. at 357 & n.26 (citing *Preston Products Co.*, 158 N.L.R.B. 322 (1966), rev'd on other grounds, 373 F.2d 671 (D.C. Cir. 1967), and various industrial relations surveys). This conclusion is buttressed by the importance that management attributes to this "employee benefit" and management's willingness to subsidize such facilities. See pages 24-26, *supra*.

As previously noted, the facts of this case are particularly compelling. Virtually every Company employee eats in the plant because of the short lunch hour and the lack of alternatives in the plant area, and because the employee locker area is unsuitable for food storage.

[35] See pages 18-19, *supra*.

379 U.S. at 222. Other decisions of this Court have recognized that the physical dimensions of an employee's milieu, in turn, include air temperature[36] and the particular hours of the day during which employees shall be required to work (and the times for eating breaks).[37]

Petitioner, relying on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 176, claims (Br. 23-27) that the Board has erred because in-plant food prices do not "vitally affect[] the 'terms and conditions of employment.'" We have shown, however, that in-plant food prices are an integral and important part of an employee's working conditions. See pages 16-19, 24-26, *supra*. Moreover, petitioner's reliance upon the "vitally affect" standard in *Allied Chemical*, *supra*, is misplaced. That case involved the question whether retired employees' pension benefits, which are not terms and conditions of the employment of current employees, nonetheless fall within the purview of Section 8(d) because such benefits "vitally affect" the terms and conditions of current workers. Thus, the "vitally affect" standard has been used by this Court when the matter in issue directly involves individuals outside the employer-employee relationship and only indirectly bears upon that relationship. See also *Local 24, International Brotherhood of Teamsters*

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[36] See *NLRB* v. *Washington Aluminum Co.*, *supra*.

[37] See *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 691; see also *Fibreboard*, *supra* ("what periods of relief are available").

v. *Oliver, supra.* Here, by contrast, in-plant food prices, which are controlled and subsidized by the Company, directly affect, and are a condition of, the employment relationship.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT)
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT)
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT, UAW LOCAL 588

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether nourishment during the workday, and its various aspects, including food services and prices, are "physical dimensions" of the employer/employee relation-

ship, and therefore "terms and conditions of employment" within § 8(d) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 158(d)?

STATEMENT OF THE CASE

Ford operates a stamping plant in Chicago Heights, an industrial suburb of Chicago. The plant stamps intermediate and large auto parts from sheet metal. It employs about 3,600 production workers, represented by the UAW and its Local 588. (Pet. A. 2).[1]

The plant works around the clock on three shifts. All employees have a 30-minute lunch break and two 22-minute rest periods. (Pet. A. 20, 33-34). The latter are used in part for snacking. Employees may not leave the plant during the 22-minute rest periods, and it is not feasible for them to leave during their lunch period. In consequence, almost no one can leave at lunch—about 12 of 3,600 do so.[2] (Pet. A. 20). Ford does not permit food vending trucks on plant property. (Pet. A. 2, 20).

Employees are permitted to bring their own food into the plant, but it may be eaten only in the cafeterias or vending machine areas. Food brought in "brown bags" may *only* be stored in locker rooms, which are merely ventilated. They are not air-conditioned. Employees have no refrigeration facilities. In the summer the lockers become very "hot and sticky and smelly." Temperatures frequently range from 80 to 100 degrees and

[1] Page references are to the Appendix to the Petition (Pet. A. 1), to the Appendix (A. 2), and to Ford's Brief. (Ford Br. 3).

[2] Ford, in challenging the Circuit Court's finding that workers lacked any alternative to in-plant food, argues that workers could go outside the plant for lunch during the 30-minute lunch period. (Ford Br. 32). However, the Seventh Circuit found that: "All parties agreed that it was not feasible for employees to leave the plant during their food breaks." (Pet. A. 2). Ford did not seek *certiorari* on this issue. Under this Court's Rule 40(d)(2) and F.R. Civ. Pro. 52, Ford is precluded from attacking these fact determinations.

cause food spoilage. Ford has occasionally employed exterminator services because of unsanitary conditions in the locker area.[3]

The Parties' Agreement Concerning Food Services

Since at least 1967, Ford and Local 588 have bargained and agreed on various aspects of in-plant food services. (Pet. A. 4).

Since June 1974, the Local Agreement has provided as follows:[4] There is to be in-plant cafeteria service with a selection of hot entrees, salads and desserts. This selection, plus a sandwich service, will be available during regular lunch periods. Cafeteria supervision is to be available during all lunch periods to insure the parties that employees are served in a reasonable length of time, given adequate service, and supplied with condiments and utensils. In addition, vending machines will be maintained, offering a variety of selections. If a vending machine breaks down, it will receive prompt servicing. The vending machine areas are to be enclosed and air-conditioned.

[3] Ford argues that testimony on the food spoilage was technically hearsay. (Ford Br. 32-33). Since this evidentiary claim was not raised either to the Board or the Court of Appeals, it cannot be raised here. *See, e.g., Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, there was direct testimony, based on first-hand observation, that lockers where food was stored became hot, sticky, smelly, and that exterminators had to be used occasionally to deal with cockroaches, rats, and mice. A. 45-49, 55, 60. General Counsel Ex. No. 2, reproduced in the addendum to this Brief, at Ad 1-5.

[4] The UAW-Ford National Agreement, covers matters common to all plants in the UAW-Ford national bargaining unit (*e.g.*, grievance procedure, pensions, arbitration, no-strike/no lockout). The National Agreement is supplemented by a Local Agreement which concerns only the given plant. Like other plants, this one is covered by both the National Agreement and its own Local Agreement. (Pet. A. 36).

To implement these provisions, and those of the 1970 Local Agreement, Ford's plant has the following food service facilities: There are two air-conditioned cafeterias and five vending machine areas. The larger cafeteria serves hot food from steam tables, and houses vending machines which dispense beverages, hot and cold food, pastry, and candy. This cafeteria seats between 400 and 500 persons. It is open for breakfast between 5 a.m. and 8 a.m., and during lunch periods. The area is open during shift changes, allowing access to the vending machines. The second cafeteria accommodates 50 to 100 persons. It is open for two of the three lunch periods on the day and evening shifts. This cafeteria does not have a steam table or cafeteria service. It has only 12 vending machines. On the plant's work floor, there are five enclosed vending machine areas, which are open during meal and rest periods. Four of these "cribs" accommodate 40 to 50 persons, and the fifth between 75 and 100. The vending machines dispense the same food items available in the smaller cafeteria. (Pet. A. 34).

Ford's Performance Through Providers

Since at least 1967 Ford has turned over performance of its contractual responsibilities to an outside provider —an industrial catering operation. In 1967, the provider was Al Green Enterprises and in 1970 it became ARA Services, Inc.[5]

Under the contract with its provider, Ford allows use of the necessary plant space, and supplies its plant with the needed equipment, utilities and maintenance (*e.g.*, steam tables, refrigerators, ovens). Ford's provider furnishes the vending machines, food, management and labor. (Pet. A. 3).

[5] While Ford happens to have contracted with caterers here, Ford provides in-plant meals to employees at other locations through its *own* food operation. *See: How Ford Motor Dishes up 18,000 Meals a Day*, BUSINESS WEEK (October 27, 1975) at 48, reproduced at Ad 7.

Ford approves its provider's price and portion lists, as well as quality specifications. Ford establishes standards of quality and cleanliness for all equipment. It inspects and enforces compliance. Ford reimburses all direct costs, and pays its provider an allowance for administrative costs and service fees.[6] If gross receipts are less than the costs of operations plus the allowance, Ford reimburses the provider for the difference, up to $52,000 annually.[7] When revenues exceed costs, Ford realizes income. When costs exceed revenues, Ford pays the difference up to that limit. In recent years Ford has subsidized the food service operations. Either Ford or its provider can cancel the contract on 60-days notice. (Pet. A. 82-94).

The Dispute

On or about February 6, 1976, Ford informed Local 588 that the prices of certain cafeteria and vending items would be increased, effective February 9th. There was no previous notice, and Ford did not furnish specific information on the amount of the increases. The Local requested that the increases be postponed until it could discuss the matter with Ford, but Ford refused. The increases went into effect on February 9th. Virtually all food items were raised either 5 or 10 cents. By letter of February 13th, Local 588 asked Ford to bargain concerning "prices and services in cafeteria and vending operations." On February 19th Ford again declined, arguing that "food prices and services are not a proper

[6] The allowance totals 9% of net receipts. (Ford Br. 6).

[7] ARA has publicly described this straight management fee arrangement as permitting "the customer [Ford here] to control menu prices." *Feeding the Big Captive Customers*, BUSINESS WEEK, (October 27, 1975), reproduced at Ad 6-8.

subject for negotiations." (Pet. A. 39, Jt. Ex. 17 & 18, reproduced at Ad 9-11).

Meanwhile, on February 16th, a boycott of the food operations began. A majority of the employees observed the boycott, and most brought their lunches during the period. The boycott of the cafeteria was ended by Local 588's Shop Committee on May 19, 1976, and the boycott of vending machines on June 7, 1976. The onset of hot weather, with consequent spoilage problems with "brown bag" food, was a main cause of its termination. Another reason was the boycott's ineffectiveness in reducing prices. (Pet. A. 40).

Local 588 filed an unfair labor practice charge on April 12, 1976. On May 16, 1976, the Board's General Counsel issued a complaint, alleging that Ford's refusal to bargain on food services and prices violated § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5). The Board ordered Ford to bargain on food services and prices, and to supply the UAW with information it had requested in these areas. The Seventh Circuit affirmed. *NLRB* v. *Ford Motor Co.*, 571 F.2d 993 (7th Cir. 1978).

ARGUMENT

I

When an employer hires someone, brings that person onto its property to labor for 8 to 10 hours, certain questions are unavoidable: Is the facility habitably warm in the winter? *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15-16 (1962). Is it dry? Is the air in the building fit to breathe? Is there enough light to work? Are those on the property safe from physical injury? And—at issue here—how is one to stay properly nourished, and able to perform work? These are not arcane or surprising issues. They must be faced by every employer who opens its doors, and by every employee who walks

through them. They are posed by the realities of human physiology. They are, as Mr. Justice Stewart put it, the "physical dimensions" of work. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964) [8] (Stewart, J. *concurring*):

> In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during these hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. [379 U.S. at 222]

Nourishment, like other physical dimensions of work, is "most obviously" a condition of one's employment. As the Court below observed:

> The food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment. [Pet. A. 12; 571 F.2d 993, 1000 (7th Cir. 1978)]

Nourishment is one of the factors in the employment situation which directly controls physical well-being on the job. Such factors are, in fact, the *most* obvious of the "terms and conditions of employment." § 8(d) of the Act,[9] 29 U.S.C. § 158(d). Whether we are "within the literal meaning of the phrase" is, of course, the issue. *Fibreboard*, 379 U.S. at 210. Nourishment fits easily

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[8] *Affirming* 322 F.2d 411 (D.C. Cir. 1963) (*per* Burger, J.), 116 U.S. App. D.C. 198.

[9] Section 8(d) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 158(d), 61 Stat. 136, provides, in relevant part: ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." The full provisions are reproduced in the Appendix to Ford's Brief at A. 1-A. 3.

and comfortably within the statutory definition, and so is a mandatory subject.

Like most aspects of the employment relationship, nourishment comes with tangled sub-issues which, in turn, are entangled with well-established mandatory subjects of collective bargaining. When will employees eat? How much time will they have? Will the employer pay for that time? Where will the employees eat? If they must leave the plant to seek restaurants, how will the logistics of the exodus and entry be handled? Are there sufficient restaurants, given the time? If employees have to eat in the plant, as here, will they have to bring their own lunches? Where will the "brown bags" be kept? Can they be stored out of the reach of vermin? Will the food spoil in the heat of summer? Will the employer provide in-plant food services, as Ford did here? What will those services be? What will be served? Will the portions, quality, cleanliness and efficiency be adequate? How much will it cost the employee and/or employer to have this portion, of that quality, served with a given, clean efficiency?

Ford urges this Court to put the judicial and administrative resources of the United States into the business of perpetually sorting out and weighing these threads. The Court is asked to hold that § 8(d)'s definition requires the litigative isolation of such a thread—say, the price of in-plant food—followed by judicial determination of whether that item has a "significant or material effect on employees' terms and conditions of employment." (Ford Br. 11). Aside from the impracticality of such an enterprise, it is premised on a mistake about the purpose of the Act. As the Court reiterated in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970):

> Thus a general process was established that would ensure that employees as a group could express their opinions and exert their combined influence over the terms and conditions of their employment. The Board would act to see that the process worked.
>
> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. [397 U.S. at 103]

This "basic theme" of the Act is well settled: *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *I.B.T. Local 24* v. *Oliver*, 358 U.S. 283, 295-6 (1959); *Fibreboard Paper Products Corp.* v. *NLRB*, 322 F.2d 411, 414 (D.C. Cir. 1963) (*per* Burger, J.), 116 U.S. App. D.C. 198, *aff'd* 379 U.S. 203, 210-211 (1964); *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163-4 (1971).[10]

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[10] Section 9(a) of the original Wagner Act contained the phrase "rates of pay, wages, hours of employment, or other conditions of employment." 49 Stat. 453 (1935). When the Taft-Hartley Act was being considered in 1947, a House amendment would have redefined both the scope of the duty, and the test for "good faith." An objective test for "good faith" was proposed, based principally on the number of times the parties met. As to the scope of the duty, the proposal was to limit bargaining to five subject areas. I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, (G.P.O. 1948) at 163-167, 312-314, 867. The Senate, however, rejected *both* House proposals, leaving the Wagner Act's definition of both scope and "good faith" intact.

Senate opposition was based on the argument that the scope of bargaining "cannot and should not be strait-jacketed by legislative enactment." I LEG. HIST. at 362, 812; II LEG. HIST. at 1339.

Ford quotes selectively from the Conference Report for the proposition that, despite the Senate action, "the intent of Congress was to retain the restrictive approach of the House bill." (Ford Br. 22).

[Footnote continued on page 10]

Ford's approach to § 8(d) demands a program inevitably increasing "governmental regulation." How else, as industrial life evolves, can one determine whether there is a "significant or material effect" for each minutia which falls into dispute between union and employer.

As we shall see, there is a place for the "vital impact" test. *Pittsburgh Plate Glass*, 404 U.S. at 178-82. It cannot govern all cases, or even all "third party" cases, "involving individuals outside the employment relationship." *Pittsburgh Plate Glass*, 404 U.S. at 178-9. It is routine for an employer to use a third party to deliver services or provisions to its work force. Blue Cross delivers health insurance. The bank provides trustee and investment services for the pension plan. The landlord may supply heat; or, as here, a third party may supply nourishment during the workday. That is, the employer may perform its side indirectly, through a surrogate, *i.e.*, a provider. Use of a surrogate-provider does not make the employer any less an "employer" under the Act.[11] Nor does surrogate provision excuse any of the employer's (or union's) statutory duties. It could not be otherwise.

The *other* third-party cases, those *not* involving a surrogate-provider, are the ones amenable to the "vital impact" analysis. In some such cases, the third party is

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[10] [Continued]

The full statement shows this reference dealt *only* with the House's proposed definition of "good faith"—not the scope of bargaining:

> Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect *as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.* [I LEG. HIST. at 538, italicized portion omitted by Ford].

[11] The definition, § 2(2), 29 U.S.C. § 152(2), provides: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ."

only servicing the entrepreneur (*e.g.* product advertising), and is not, even indirectly, provisioning the employees. In others, delivery to third parties (*e.g.* retirees) does not involve delivery to the bargaining unit, since they are not "employees" within § 2(3), 29 U.S.C. § 152(3). *Pittsburgh Plate Glass*, 404 U.S. at 176.

Such situations do not, as a definitional matter, involve "terms and conditions of employment," since they do not "settle an aspect of the relationship between the employer and employees." *Pittsburgh Plate Glass*, 404 U.S. at 178-9; *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958).

Yet this Court has held that, even in this area, there *may* be a bargaining duty in the unusual case—where there is a vital impact on the terms and conditions of employment of the active employees. The Court's discussion of the "vital impact" issue in *Pittsburgh Plate Glass* is in *these* terms, addressed *arguendo* to an alternative holding of the Board.[12] 404 U.S. at 176-82. The Board's use of the standard, like the Court's critical review of that use, *presupposes* that, since retirees are not "employees," [13] the case fell beyond "the relationship between the employer and employees." 404 U.S. at 178-9. There was *no* issue, as there is here, of the employer using a surrogate-provider to deliver to its employees. Instead, the discussion of "vital impact" in *Pittsburgh Plate Glass*, including its treatment of *Fibreboard*, is

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[12] The primary issue was, of course, definitional: Are retirees "employees" within § 2(3) of the Act, 29 U.S.C. § 152(3)? Against the possible loss of the definitional issue, the Board had gone on to hold, in the alternative, that there was a vital impact on active employees. 404 U.S. at 176-7.

[13] For the Board, this was an *arguendo* presupposition. For the Court, it was not.

occasioned by a distinct (and more difficult) sort of third-party situation—benefits for third-party non-employees, and third-party service to the entrepreneur. This is not the situation presented here. It was, however, the situation presented in *Fibreboard* and *Oliver*, the two cases used in the "vital impact" analysis in *Pittsburgh Plate Glass*, 404 U.S. at 178-82. The third-party contractor in *Fibreboard* fell beyond the employer/employee relationship, since it only supplied production to Fibreboard. 379 U.S. at 224 (Stewart, J., *concurring*). Nevertheless, the Court held that, for the particular type of "contracting out" involved,[14] there was a sufficiently serious effect on the bargaining unit, relying on *Oliver*. 379 U.S. at 212-15. *Oliver* itself involved a third-party owner-driver,[15] whose rental rates, if inadequate, would have subverted the wage structure for employed drivers. 358 U.S. at 294. Mr. Oliver was not supplying the employees anything. On the contrary, he was supplying the employer at the bargaining unit's expense. The Court in *Pittsburgh Plate Glass* was quite correct in limiting "the principle of *Oliver* and *Fibreboard*," *i.e.*, the "vital impact" test, to the unusual case where:

> . . . the question is not whether the third-party concern is antagonistic to or compatible with the interests of the bargaining unit employees, but whether it vitally affects the 'terms and conditions' of their employment. [404 U.S. at 179]

[14] Tantamount to "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employement. . ." 379 U.S. at 215.

[15] Mr. Justice Whittaker would have held that owner-drivers are not "employees," without reaching the "impact" issue. 358 U.S. at 297-8. The majority in *Oliver* did not reach the definitional issue. 404 U.S. at 178. *Pittsburgh Plate Glass* discusses *Oliver* on the clear assumption that Justice Whittaker was right about the definitional issue. The presence of a "vital impact" in *Oliver* nevertheless required the Court to venture further than Justice Whittaker preferred.

Pittsburgh Plate Glass is that sort of third-party case, but this case, as it involves a surrogate-provider to the employees, is not. Of course, despite the relevance of the *Oliver* and *Fibreboard* principle to *Pittsburgh Plate Glass*, the Court concludes that the asserted impacts are "too speculative." 404 U.S. at 182.

Here, in the nature of the case, there is no need to reach, disentangle, or weigh the "impact" issue. Much less, should the Court embark on a general program of doing so. This case is simple by comparison to this Court's earlier cases, as it involves only the "physical dimensions" of work. *Washington Aluminum* controls here. There is no occasion to expand the "vital impact" analysis to the entirety of § 8(d), as Ford urges. That principle was born to handle the unrelated and more difficult problems presented by *Oliver*, *Fibreboard*, and (*arguendo*) *Pittsburgh Plate Glass*. Its use in the surrogate-provider context would spawn nothing but more litigation and regulation. At least where, as here, the issue is the "physical dimensions" of the employer/employee relationship, those problems should be left where Congress intended—at the bargaining table.

II

The interment of Ford's remaining arguments follows directly:

Ford does not begin at the beginning. The first question is whether nourishment, and its sub-issues, are "physical dimensions" of work, and so within the statutory wording of § 8(d). Ford skips this issue, and begins with a logically *secondary* issue—if nourishment is not a term or condition, is there enough "vital impact" under *Fibreboard* and *Pittsburgh Plate Glass* to make the subject mandatory? Beginning with the secondary issue is wrong for several reasons: It begs, rather than answers, the issue before the Court: the logically prior issue,

whether nourishment is a "physical dimension" of work, and within § 8(d). And, as we have seen, through a misreading of prior cases, it commits the Court to extending the "vital impact" analysis to the entirety of § 8(d), moving the debate from the bargaining table to the courtroom.

The existence of ARA here is irrelevant because, as the record makes obvious, ARA is only a surrogate, *i.e.*, a third party through which Ford is delivering a "physical dimension" of the working environment in its Chicago plant. It is as if, in *Washington Aluminum*, the company had contracted to buy steam heat from a third party, rather than operating its own boiler. This Court's holding that heat is a term and condition of employment cannot be dependent on how the employer chooses to supply the heat, whether directly or through a surrogate.

Surrogate-provider arrangements are as common to industry as are daffodils to a springtime park. Virtually all benefits are provided through such arrangements, *e.g.*, medical, disability, life, dental, vision, drug, and (now even) legal insurance. Guard agencies provide security. Others handle maintenance or sanitation. Utilities supply heat and light. Banks provide fiduciary services for pension and welfare benefits. Surrogate provision is as essential as it is common. Without such "mass" provision, with its economies of scale, most of the benefits now enjoyed by our population would be impossible.

Yet this is the first time that it has *ever* been suggested to this Court that, *because* a surrogate-provider is chosen, what is provided (in some sense) ceases to be a term and condition of employment. This is a disquieting and even revolutionary suggestion. Forty years of collective bargaining, and several provider industries, have been built on the contrary assumption.

Ford complains that, having chosen ARA as its surrogate, it lacks enough control over nourishment to meet a bargaining duty. This overstates the burden of that duty. It is *only* a duty to bargain, *not* to agree. *H. K. Porter*, 397 U.S. at 106, and cases cited. A prudent party will not agree to something it cannot deliver. To compel agreement is beyond the Board's authority, and the Act's intent:

> [I]t is 'clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' [*H. K. Porter*, 397 U.S. at 106, *quoting NLRB* v. *Am. Nat. Ins. Co.*, 343 U.S. 395, 404 (1952)]

In any event, on this record, Ford's worries are contrived. Since 1967, Ford has bargained, agreed and (through its surrogate) delivered on virtually all aspects of nourishment, save prices.

If, in other cases, there were evidence of "lack of control" or "futility," there would also be a place to make the argument—at the bargaining table. Though important, these arguments go to relative bargaining strength, *not* to the propriety of bargaining. They are good arguments, if sound, for not agreeing to impossibility. But they are no substitute for the discussion essential to determining whether that problem exists, or can somehow be avoided. "Futility" arguments, if immunized from the adversary process, are notoriously speculative.

The Board and the courts have no place in weighing relative bargaining strength, even indirectly. *H. K. Porter*, 397 U.S. at 106. If the government somehow gets entangled in that enterprise, "futility" is nothing more than a remedial issue. It does not go to the existence of statutory duty. Thus, for instance, in *Fibreboard*, the employer argued that it was an undue burden

for the Board to require termination of the agreement with the maintenance contractor. That contract was terminable on 60-days notice, exactly as is ARA's here. 379 U.S. at 216 n.10. This Court saw no difficulties with the remedy, 379 U.S. at 216-217. Here, of course, the Board is not requiring termination of the Ford/ARA contract, only that Ford and the UAW bargain *after the fact* about matters which may be encompassed in it. This case is *a fortiori*.[16]

Ford's argument,[17] even posed properly as a remedial issue, offends the purpose of the Act. Ford wants indirect governmental regulation of the bargaining

[16] Ford says it is bereft of guidance as to the scope of the Board's order here. (Ford Br. 35-6). But Ford failed to raise the specificity of the order as an issue before the Board, the Court of Appeals, or in its petition for *certiorari*. At the Board and the Court of Appeals, Ford argued *only* that its refusal was limited to prices. (Pet. A. 24).

[17] Ford takes some perplexing positions. If Ford is right, and these matters are not mandatory subjects, then Ford stands in danger of losing up to $52,000 a year on the food operation. If that loss is caused by consumer dissatisfaction, one would think it in Ford's self-interest to be able to bargain with those consumers, and mitigate the loss. Yet, if this area is permissive rather than mandatory, the Union can refuse to talk about the problems. The bargaining duty is mutual. If Ford has no duty, the Union has no duty. There is nothing Ford could do to make the Union bargain on a permissive subject. It is ironic that this helplessness, a corollary of Ford's own position, could subject it to a $52,000 annual loss.

Ford also argues that the remedy for price increases should be wage bargaining. (Ford Br. 15, 21, 26). This is a strange position, as it disproves Ford's case. It acknowledges, by implication, that nourishment issues come within the statutory definition of "wages." § 8(d), 29 U.S.C. § 158(d). *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *cert. den.* 336 U.S. 960 (1949). That aside, since most fringe benefits "have their price," *i.e.*, can be privately purchased, such an approach would eliminate fringe benefits as mandatory subjects of bargaining.

Ford's "lack of control" argument oddly infers that it has little control over its property, and those who enter on it. *Contrast: Marshall* v. *Barlow's Inc.*, —— U.S. —— (1978), 98 S.Ct. 1816; *Sears Roebuck & Co.* v. *The San Diego Co. Dist. Carpenters*, —— U.S. —— (1978), 98 S.Ct. 1745.

strength of the parties, under the guise of assaying "control" or "futility." Even remedial regulation of bargaining strength is beyond the pale. This Court, in *H. K. Porter*, reversed the Board and the D.C. Circuit for a comparable attempt:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. [397 U.S. at 106-8, footnote omitted]

The courts are, of course, similarly limited to the policies of the Act.

III

Ford correctly observes that industrial peace is a central goal of the Act. A bargaining duty, we are told, will disrupt that peace by imposing the chaos of perpetual bargaining on trifles. These are but trepidations of counsel.[18]

Since 1967, Ford has come to bargain about and live with every aspect of the nourishment issue, except prices.

[18] Ford theorizes that, in a multi-union context, bargaining on nourishment is "all the more infeasible." (Ford Br. 14, 34). But this has never been a material issue where other "physical dimensions" are involved. Presumably, if it is 15° F. in the workplace, the affected employees have a right to bargain, regardless of the number of labor organizations. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). To excuse the duty to bargain about "physical dimensions" on this ground would fundamentally restructure the Act. In any event, this record only involves one employer, and one union, at one plant.

There is no "chaos" or "perpetual bargaining" in the record.[19]

On the contrary, this record shows exactly what Congress intended—the "mediatory influence" of institutionalization, arrived at by bargaining:

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial dispute by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. [*Fibreboard*, 379 U.S. at 211, footnote omitted]

Negotiated methods and procedures are particularly effective ways to handle the disputes of industrial life. Creation of "industrial self-government," as the Chief Justice has observed, is the key to the Act's success:[20]

[19] The UAW conducted a survey of the 101 separate units covered by Local Agreements within the UAW-Ford national bargaining unit. Responses were received from 50. Forty-one indicated that their Local Agreements contain provisions dealing with some aspect of nourishment, normally food services.

Ford claims that labor agreements are "uniformly silent with respect to in-plant food prices" (Ford Br. 13). The support is its review of "many" sample agreements in the BNA's loose-leaf service, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS §§ 20-30. (Ford Br. 29). This service, in fact, contains only nine labor agreements. Eight of these labor agreements are so-called "master" or "national" contracts. By their nature, such master or national agreements do not deal with items of purely local focus, such as food. These areas are left for the local agreement, as here.

[20] *See: Fibreboard*, 379 U.S. at 214: "[A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the Congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." *See also:* A. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412 (1958): "Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become

> The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. *See*: *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-81 (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce. [*Fibreboard, below*, 322 F.2d 411, 414 (D.C. Cir. 1963), 116 U.S.App.D.C. 198]

Where the stakes are small, as Ford urges they are here, a refusal to talk is all the more uncivil.

It cannot be denied that, in absolute terms, many aspects of industrial life are picayune. This is so from both the management and the employee points of view.[21]

apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion."

[21] Management's right to discipline typically extends to very minor matters, *e.g.*, dropping bolts, leaving hand tools around, making a little too much scrap, not cleaning up your area promptly, or being slow about obeying directions. In *Anheuser-Busch Inc.* v. *IBT Local 633*, 511 F. 2d 1097 (1st Cir. 1975), *cert. den.* 423 U.S. 875 (1975), the employer promulgated a rule forbidding the employees from wearing "tank-tops" in large areas of the plant. The Company was worried that members of the public, touring the plant, would be offended by the "beer bellies" exposed to view by that attire. There was a work stoppage, and, in reviewing the injunction, the First Circuit was moved to observe that "[t]his tempest has been brewed in a very small teapot." 511 F. 2d at 1098. Yet no one suggested that, because the dispute was minor (and perhaps silly), it fell beyond the parties' bargaining duty. Indeed, the First Circuit quite sensibly thought bargaining and arbitration was a much better forum than the federal courts. Any experienced labor lawyer,

Like more serious matters, these are resolved by negotiation and arbitration. The parties' settled procedures can categorize and solve the issue on the plant floor, without involving higher management or labor representatives. Contractual agreement most often forecloses reopening of the substantive issue for the term of the labor contract, generally three years. The agreement may establish a procedure, or set a progression of changes occurring over its term. Triviality, where it exists, argues for *more* bargaining and "self-government," not less. For, if it is not handled by the parties, the alternative will be governmental regulation. If, as a matter of law, triviality destroys the bargaining duty, industrial relations, especially in the area of discipline, will be radically altered.

But let us assume the worst. Assume *arguendo* that the parties are petty, and fall into economic warfare over the smallest matters. The Act contemplates economic combat, and does *not* allow governmental intervention on that ground alone.[22] As this Court taught in *H. K. Porter*, reversing the D.C. Circuit's intervention:

> But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that

whether on the management or union side, has had innumerable picayune problems resolved by bargaining, without burdening the courts. Can men be naked to the waist in a St. Louis assembly plant in the summer, or must they wear "T-shirts" for modesty's sake? Does it offend propriety for women employees to clean the men's bathroom, or *vice versa?* How long can hair be worn? Ford itself once disciplined a woman employee for wearing *red* slacks. The arbitrator, Dean Shulman of Yale, had to decide whether that color constituted a production hazard because of its asserted tendency to distract male employees. Shulman, OPINIONS OF THE UMPIRE (FORD MOTOR CO.), Opinion A-117 (1944).

[22] *See:* Harlan, J., *concurring*, in *NLRB* v. *Borg-Warner*, 356 U.S. 342, 358 (1958); and *NLRB* v. *Am. Nat. Ins. Co.*, 343 U.S. 395, 408-9 (1952).

> the Act forbids the employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining. It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submissions to one side's demands. The present Act does not envision such a process. [397 U.S. at 109]

Industrial self-government may fail, even over small matters. But parties foolish enough to let that happen, as the Act now stands, only embroil themselves—not the Board and the courts. Even in the worst case, the Act does not contemplate judicial intervention to instruct the combatants about what is (and is not) trivial. The Act only requires that the battle occur within the boundries of the statutory definition.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be *affirmed.*

Respectfully submitted,

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January 16, 1979

ADDENDUM

ADDENDUM

General Counsel Exhibit 2

Survey taken August 27, 1973, between the hours of 2:30 P.M. and 7:30 P.M.

Temperature from Chicago			Temperature outside Plant	
2 P.M.	95	40% H.	2 P.M.	96
4 P.M.	95		4 P.M.	95
5 P.M.	94	40% H.	5 P.M.	95

T.H.I. formula

THI = 0.4 of temp. & humid + 15
70 = most people comfortable
75 = ½ people satisfied
80 = most people un-comfortable

Ex: Temp 98 Humid 65% = 80.2

Location	Temp.	Humid.	Factors
1.1	94	65%	Aisle
1.3	95		Chute
1.5	95		Chute
2.1	95		Not running Aisle
2.3	95		Not running
2 line gap	96		Not running
3.1	97	70%	Aisle
3.3	98		Chute
3.5	97		
3.8	98		
4.1	97		Aisle
4.6	97		
5.1	98		Not running
5.3	100		Chute Not running
5.5	102		Chute
5.6	98		
6.1	98		Aisle
6.3	100		Chute
6.6	101		Chute
6.7	98		
7.1	98	65%	Aisle Not running
7.4	99		
7.5	98		
7.6	100		Chute

General Counsel Exhibit 2—Continued

Location	Temp.	Humid.	Factors
8.1	98		Aisle Not running
8.3	98		Not running
8 gap	98	68%	
9.2	100		Chute
9 Loading	99		
10.3	98		
10 gap	98		
58.4	99		
58 Loading	98		
11.1	98		Aisle
11.2	102		Chute
11.3	99		
12.5	99		
12.5	99		
13 Loading	100		
13.1	98		
13.4	99		
13 gap	99		
14.1	98	65%	Aisle
14.4	98		
15.1	98		Aisle
15.2	101		Chute
15.4	100		Chute
16.1	98		Aisle Not running
16.3	99		
16 gap	98		Not running
17.1	98		Aisle Not running
17.2	100	70%	Chute Not running
17.3	98		
18.1	97		Aisle Not running
18.4	99		Chute Not running
63.1	97		Not running
63.4	97		
63.5	97		
19.1	97		Aisle Not running
19.4	98		
19.6	98		
19 Loading	97		
20.2	98		
20.3	99		
20.5	99		
20 Line weld.	100		
21.1	97		Not running
21.3	98		
21.5	98		

General Counsel Exhibit 2—Continued

Location	Temp.	Humid.	Factors
21 Line weld	97		
22.1	97	70%	
22.2	97		
22.7	98		
22 Loading	98		
23.1	97		Aisle
23.2	98		
23.4	98		
23 Weld	97		
24.1	97		Aisle
24.3	97		
26.1	97		Aisle
26.2	99		Chute
26.4	96		
26 Loading	97		
27.1	97	60%	
27.3	97		
27.5	96		
28.1	96		
28.2	96		
28.4	96		
28.5	97		
29.1	96		
29.3	97		
29.5	97		
29 Loading	96		
Dept. 11		65%	
B.S. 1	97		
Sq. Shear	97		
B.S. 5	98		
B.S. 9	98		
B.S. 11	98		
S.R. 2	98		
S.R. 4	98		
14 Dept.		70%	
S.P. 18	96		Aisle
S.P. 3.2	96		
S.P. 4.1	97		
S.P. 4.6	98		
S.P. 5.4	97		
S.P. 6.3	98		
S.P. 6.7	98		
S.P. 7.2	97		
S.P. 7.6	98		
S.P. 8.4	98		

General Counsel Exhibit 2—Continued

Location	Temp.	Humid.	Factors
S.P. 8.7	97		
Auto. Blankers SP	96		
51.1	97	70%	Aisle
51.3	97		
52.2	98		
52.4	98		
53.2	97		
53.5	97		
54.1	97		
54.5	97		
55.1	97		
55.4	97		Not running
56.2	97		
57.2	98		
57.4	98		
57.6	98		
61.1	98		
61.3	98		
61.4	98		
62.1	98		
62.3	98		
62.4	98		Aisle
64.2	99		
64.4	99		
21 Dept.		65%	
Bumper Assem.			
d.b.c. Frame	98		
Salvage booth	101		
Welding booth	99		Not running
Pre-tact C Frame	98		
Welding booth	101		
Loading area	101		
Truck floor pan			
Loading	99		Not running
C. Frame	99		
747			
#1 C Frame	99		
#2 C Frame	98		
Loading Station	98		
21 Dept. Sm. Parts			
Intrusion Bar	99		
Fender apron	99		
Running board	98		
Car Door Line			

General Counsel Exhibit 2—Continued

Location	Temp.	Humid.	Factors
Loading Station	95		
Sandwich Station	97		
# 2 4 Poster	98		
#1 C Frame	97		
Cowl Top	98		
Rocker Panel	96		
24 Dept.		60%	
Truck Door Line		60%	
#2 C Frame	96		
Sandwich Stat.	96		
Loading Stat.	95		
Hydro Press	99		
Hydro Press Load.	96		
Dash Pan	95		
Floor Pan C Frame	96		
Floor Pan Load	96		
Roof sill	96		
D.B. Cross member	95		Not running
D.B. Door			
Loading Station	96		
C Frame	97		
Re Strike	96		
21 Dept. Break area	97		Aisle
Crane #15	102	45%	
Ship. Break Area	96		
Ship. Area Y-19	95	45%	
Auto Repair Shop	96	50%	
Sheet metal shop	95		
Die Storage Pit	95		
X aisle washroom	95	70%	
K aisle end of 2 line	94		
Basement between 4 & 5	102	72%	
North Break area	94		
Basement between 8 & 9	101	68%	
South Break Area	97		
So. K Aisle washroom	95	70%	
T & D Bay 3	97		
T & D Bay 2	98		

Feeding the Big Captive Customers,

BUSINESS WEEK (October 27, 1975) at 46-54

FEEDING THE BIG CAPTIVE CUSTOMERS

The growing appetitite of factories, schools, hospitals

Soaring costs are only part of the headache for the $27 billion institutional food-service business. In the meals they serve, schools, factories, health-care facilities, airlines, and other institutions deal with a captive market. While that guarantees a continuing group of customers, it also guarantees the same group day after day (with the obvious exception of airlines). So there is a constant problem of providing variety, quality—and yet holding costs down.

It is not easy. Indeed, franchiser Ernest Renaud, president of Long John Silver's seafood restaurants, is building a new headquarters building—without an employee lunchroom. "Even though we are in the restaurant business," says Renaud, "we are not about to cook food for these 150 people five days a week." Apart from the tricky economics of serving a small group, he notes, "employees get mad if they don't like the food, and they take it out on the company by griping. Then if they have other gripes, suddenly you have sagging morale. Institutional feeding can be very sensitive—whether you're serving employees, hospital patients, school children, or whatever." So Renaud is settling for vending machines.

At the same time, specialized "food management" contractors have also been hit hard by the recession—mainly because of their lopsided concentration in office and plant feeding. With combinations of vending machines and manual food service, contractors now account for 70% to 75% of the $10 billion industrial market. That compares with only 10% of the $6 billion health care market and 10% to 15% of the $7 billion education market.

Because of increasingly stiff costs and a fall-off in industrial employment and feeding, profits have slipped at ARA Services, Canteen, Servomation, and other leading contractors. For giant ARA Services, the biggest of the vending and contract feeding companies ($1.2 billion in sales last year), food service now accounts for 71% of total volume but only 55% of earnings. Without the volume economies available to larger contractors, many institutions that handle their own food service are feeling even more of a squeeze.

The commissions gambit

In industrial feeding, many contractors started off on the wrong foot by offering fat commissions to plant and office clients. These often ran 5% to 15% of gross volume. "It wasn't until contractors began analyzing operations that they discovered they were their own worst enemies," says Van Myers, a senior vice-president of Wometco Enterprises Inc., a Miami food-service company. "They were fighting to pay the highest commissions when profits didn't warrant it."

Now most of the larger contractors are cutting back commissions, rewriting contracts with cost-of-product escalators, and even including cancellation clauses of 30 and 60 days. In some instances, ARA and other contractors simply shift to straight management fees. "The client reimburses us for all costs—labor, food, overhead—and pays us a management fee of a percentage of the volume, or perhaps a flat dollar amount," says William S. Fishman, ARA president. This is self-adjusting for inflation and permits the customer to control menu prices.

In return, employee food service often goes from being a subsidized money-loser to a break-even operation—or even a small profit center. Macke Co., for instance, has come up with a Pick 'N Pay counter that offers prepackaged meals, deli platters, sandwiches, and other fast

foods. In terms of sheer volume, Macke claims that Pick 'N Pay moves food twice as fast as vending machines and three times faster than a normal cafeteria. It also cuts labor costs, because all food is prepared in a central commissary. "With Pick 'N Pay," says Joseph P. Kingrey, group vice-president of food and vending services for Macke, "you can take an installation from a 10% loss to 6% profit."

Cost control, however, must be rigid. Wometco's vending division is now so highly computerized that at the end of each day the headquarters office knows what each vending installation sold that day and how much food will be needed the following day. Then each week, the division comes up with a profit-and-loss statement that helps cut down on theft—always a problem for vending companies. "We can tell almost immediately if someone is clipping us," says Vice-President Jose A. Martinez. "If we come up with a cost that is higher than 0.5% of what we think it should be, we get that word right back to our regional managers. And since we are computerizing 10 basic items where the gross profit ranges from 25% to 75%, you can see how closely we watch expenses."

Amid the viscissitudes of the industrial market, many food-service contractors are turning more and more to the educational market. As Earl J. Rosenstein, senior vice-president of Interstate United Corp., notes: "Schools have a much more stable population base. And unlike manufacturing, where layoffs have cut our revenues, we can plan on a long-term basis how to provide for the facility and what revenues to expect." Right now some 25 million youngsters in 88,000 schools are participating in federally supported school lunch programs.

Bidding on schools

Yet because of increasingly tight budgets, school administrators drive a hard bargain. Says one disgruntled

feeding contractor: "You can give the school district a good in-stock position, furnish the exact product when needed, deliver it frozen or whatever, and then the next time around if you are 2¢ too high in your bid, the job will go to somebody else who may not deliver. It can be a lousy business."

George R. Allin Jr., a food administrator for the Arlington (Va.) schools, typifies today's hard-nosed school official. Under heavy budget pressure in the last four years, Allin has helped switch Arlington's schools from on-site meal preparation to centralized kitchens.

Since then, the school system has cut its lunch-program work force by more than half, trimmed wages by 40%, and chopped the Arlington School Board's lunch subsidy from $500,000 a year to $200,000. Allin concedes that something may have been lost in the process, citing the switch to prepackaged meals for elementary-school children. "Take fried chicken," he says. "When you reheat it, there's steam under the foil, so it doesn't come out crispy. It's a little soggy." But he calls that a small price to pay.

On a more limited scale, Armour Food Co. did a similar job for a large state institution for retarded children. The institution had two kitchens serving 900 children. Armour experts suggested closing one kitchen, replacing four conventional ovens with two more efficient convection units, and putting more emphasis on convenience foods. The result: 7,000 sq. ft. of space were turned into critically needed warehousing area, oven cooking time fell 30%, and the work force dropped 20%.

Unlike a few years ago when most contractors offered only variations on the same standard meal packages, many contractors now tailor entire programs to fit a school's needs. Edward Engoron, senior vice-president for marketing at Mannings Inc., cites a recent contract that

Mannings signed with the University of Houston. Two other food-service companies had given up on the university's two cafeterias after losing money. "We sat down and asked students what they wanted to eat," says Engoron. "We found that they didn't want two cafeterias. They wanted soups and health foods, and they wanted McDonald's." So Mannings designed a Jack Armstrong's All-American Burger as part of a fast-food operation, set up a counter for deli and soup offerings, and converted a campus coffee house to a beer-and-wine nightclub. "In the first four weeks of operation this summer," says Engoron, "we did twice the business per week that the other operators did."

No more lobster tails

Volume efficiencies are coming more slowly in the big, lucrative health-care market—mainly because contract specialists have only started penetrating that field. "As labor becomes more and more the critical factor, food management companies will take over," says Edward A. Hurtik, manager of food services for Hospital Affiliates Inc., which owns or manages 65 hospitals. "But right now, give me a good kitchen staff, and we can do the job cheaper."

Nor are the market's needs as simple as some contractors originally thought. John Metz, president and founder of Custom Food Management Systems Inc., notes that when his own company entered the health-care business, he assumed that hospitals could lose their reputation for dull food by simply changing menus. "In the beginning," says Metz, "we even had lobster tails on the menu. Since that time, we've had to eliminate some of our high-cost items. We had to get practical."

On the West Coast, where labor costs in hospital food service runs as much as 15% higher than those in other parts of the country, Kaiser Foundation Hospitals is

approaching the ultimate in elimination. Kaiser's 11 northern California medical centers have done away with all kitchens and most of the associated storage space and equipment. In their place is a system of microwave ovens for cooking flash-frozen entrees. The food is assembled on meal trays at one of Marriott's airline commissaries and delivered daily to each hospital, where the trays are refrigerated until needed. "A typical 250 bed hospital with a large cafeteria might have 40 full-time people in food service," says Florine Allen, Kaiser's dietary consultant. "We have reduced the number to four."

American Medicorp Inc., which owns and operates 45 hospitals, has similar ambitions. It plans to hire professional food-service managers and hospital experts to study all 37 of its in-house food operations, as well as the eight hospital kitchens run by Saga Corp. and Stouffer Corp. Already, Paul D. Powell, American Medicorp's director of purchasing, can tick off the problems: "We should standardize menus, we haven't gotten into convenience foods yet, our distribution system within the hospitals is old-fashioned, and we prepare food in the kitchens the same way we did many years ago."

James Biggar, chairman and chief executive of Stouffer, cites studies showing that "if you give patients good, hot food and they are happier, they get well quicker." In its way, that could even serve as a prescription of sorts for the entire food-service industry. "As long as we deliver a good meal at a fair price and fair return on investment," says Allan P. Lucht, chairman and president of Servomation, "this industry has got to grow and prosper in the years ahead—rising costs or not."

How Ford Motor dishes up 18,000 meals a day

Ford Motor Co. may not be selling a lot of cars these days, but it is selling plenty of employee meals. Every

day Ford dishes up 17,000 to 18,000 meals in 15 Detroit-area locations, bringing in $5 million a year. While this amounts to only 10% of Ford's total employee feeding (the rest is handled by contractors), it still represents one of the largest company-operated programs in the country. Because of this, Ford watches its food service costs just as closely as its manufacturing costs.

As his main offensive tactic, Will O'Sullivan, Ford's manager of food services, has trimmed lunchtime serving hours, dropped bacon and some other pork items from the menu, occasionally substitutes fish or other high-protein items for beef—and seldom hesitates to pass cost increases along to customers. Ford's biggest cost saver is its 100,000 sq. ft. central food processing center. It handles butchering, salad preparation, baking, and other "pre-preparation." Items are trucked from the center to the various plants, where kitchen help cooks the meat, mixes in the salad ingredients, and puts everything on the plate.

Computer help. If Ford needs 3,000 roast beef dinners with baked potatoes for the next day, a computer tells how much to order of what ingredients. "If we need 281 lb. of potatoes," says O'Sullivan, "we don't buy more, hoping to get rid of the excess."

Ford's objective is to break even, he says. "Even with large, highly automated plants with few employees, it's difficult—but not impossible." In an industry as automated and efficient as the auto business, O'Sullivan naturally tends to feel that the level of food-service innovation is lagging. Then he adds hopefully: "But there are changes occurring."

Joint Exhibit 17

PRICE CHANGES

(Effective Monday, February 9, 1976)

Soup (All)	35¢
Milk and Orange Juice	30¢
Entrees (All except below)	55¢
Beef Stew	60¢
Beans and Franks	60¢
Potato Hash & Beef	60¢
Corn Beef Hash	60¢
Cold Food Machine	
Bar B-Q'B (All)	75¢
Bologna (Plain)	55¢
Bologna and Cheese	60¢
Cheese (Plain)	50¢
Cheeseburger	60¢
Chicken, Fried	75¢
Corn Beef	75¢
Egg. Hard Boiled	40
Fish Sandwich with Tartar	60¢
Ham	65¢
Ham and Cheese	70¢
Hamburger	55¢
Hot Dog	40¢
Italian Beef	75¢
Italian Sausage (Plain)	70¢
Italian Sausage with Peppers	75¢
Juices, All Flavors	25¢
Omelet, Cheese	65¢
Omelet, Sausage & Egg	70¢
Pizza	50¢
Polish Sausage, Plain	70¢
Polish Sausage with Peppers	75¢
Poor Boy	70¢
Poor Girl	70¢
Popcorn	50¢
Roast Beef	70¢
Salami	60¢
Salami & Cheese	65¢
Sausage & Biscuit	55¢
Steak & Onions	75¢
Tamale	35¢
Yogurt	50¢
Burritos	55¢

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Joint Exhibit 18

Entree	Present Selling Price	Increase	Suggested Selling Price	Units Per Day	Sales Increase
Chili	$ .45	$ .05	$ .50	35	$ 1.75
Soup	.25	.05	.30	90	4.50
Entree I	.80	.05	.85	250	12.50
Entree II	.75	.05	.80	160	8.00
Deli Special	.95	.05	1.00	105	5.25
Vegetable	.25	.02	.27	180	3.60
Small Salad	.25	.02	.27	50	1.00
6 Inch Salad	.35/.50	.05	.40/.55	90	4.50
Salad 9″	.95/1.15	—	—		
Cold Sandwiches	—	—	—	—	—
Hot Sandwiches	.35/.70	.05	.40/.75	90	4.50
Gelatin Cubes	.25	—	—	—	—
Gelatin Molds	.30	—	—	—	—
Pudding	.25	.05	.30	35	1.75
Sweetroll	.25	—	—	—	—
Fried Cake	.25	—	—	—	—
Hard Roll	.15	—	—	—	—
Bread	.04	.01	.05	300	3.00
Layer Cake	.30	.05	.35	50	2.50
Assorted Pies	.40	.05	.45	80	4.00
Coffee	.15	—	—	—	—
Tea	.15	—	—	—	—
Sanka	.15	—	—	—	—
Cold Drinks	.20	—	—	—	—
Ice Cream	.20/.30	—	—	—	—
Buttered Toast	.07	.01	.08	60	.60

Joint Exhibit 18—Continued

Bacon Slice	.15	.05	.20	100	5.00
Sausage Link	.15	.05	.20	70	3.50
Egg	.20	—	—	—	—
Pancake	.15	.05	.20	60	3.00
Butter Pat	.02	—	—	—	—
Soft Ice Cream	.35	—	—	—	—
Biscuit	.10	.02	.12	50	1.00
Milk—1/3 Qt.	.25	.05	.30	120	6.00
Milk—a Pt.	.30	.05	.35	120	6.00
Butter Milk—1/2 Pt.	.20	.05	.25	20	1.00
Skim Milk—1/2 Pt.	.20	.05	.25	10	.50
VENDING:					
Hot Beverages	.15	—	—	—	—
Cold Beverages	.15	—	—	—	—
Gum (5 Stick)	.10	—	—	—	—
Gum (7 Stick)	.15	—	—	—	—
Candy	.15/.20	—	—	—	—
Pastries	.15	—	—	—	—
″	.25	—	—	—	—
″	.30	.05	.35	75	3.75
Snacks	.15	—	—	—	—
Sandwiches	.35/.70	.05	.40/.75	300	15.00
Hot Entrees	.50/.55	.05	.55/.60	225	11.25
Soup	.30	.05	.35	200	10.00
Cigars	.35/.65	—	—	—	—
Ice Cream	.20	—	—	—	—
Crackers	.10	—	—	—	—
Milk—1/3 Qt.	.25	.05	.30	900	45.00
Juice—1/3 Qt.	.25	.05	.30	250	12.50

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER, FORD MOTOR COMPANY

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REPLY BRIEF FOR PETITIONER, FORD MOTOR COMPANY

I. RESPONDENTS HAVE NEITHER SHOWN THAT IN-PLANT FOOD PRICES SHOULD BE A MANDATORY SUBJECT OF BARGAINING NOR REFUTED FORD'S CONTRARY ARGUMENTS.

Neither the Board nor the UAW has furnished the Court with a convincing rationale for holding in-plant food prices to be a mandatory subject of bargaining;

nor, indeed, has the AFL-CIO, the *amicus curiae* supporting their position.

A. Basic to the position of the Board and the UAW is the tautological argument that bargaining over in-plant food prices should be declared mandatory because a principal purpose of the Act—the peaceful settlement of industrial disputes through the collective bargaining process[1]—would thereby be furthered (Board Br. pp. 13, 28; UAW Br. pp. 8-9). The argument, also made by the AFL-CIO (AFL-CIO Br. pp. 16-19), begs the question, however, for its acceptance would require that there be collective bargaining over any matter that either the employer or the union might select, thereby obliterating the long-established distinction between *mandatory* and *permissive* bargaining subjects (See Ford Br. pp. 23-26, 31).[2]

B. The Board, the UAW, and the AFL-CIO also argue (Board Br. pp. 11, 15-17, 30-31; UAW Br. pp.

1. Both the Board and the AFL-CIO argue that because Ford's employees engaged in a cafeteria-vending machine boycott to protest increases in food prices, bargaining should be required with respect to such increases in the interest of industrial peace (Board Br. p. 29, AFL-CIO Br. p. 25, n. 10). The argument is unpersuasive for a finding in agreement with the Board's position might well encourage, rather than prevent, disruptive activity. See *infra*, pp. 6-7. The industrial strife that the Act seeks to avoid is strike action (withholding by employees of labor) that disrupts the economy, not the withholding of patronage that is part of the economic system. Furthermore, in numerous instances in the past where employees had undertaken economic action to enforce bargaining demands, the Board and the Courts have rejected claims that the various matters involved were mandatory subjects of bargaining. *See, e.g., N. L. R. B.* v. *Local 964, Brotherhood of Carpenters,* 447 F. 2d 643 (2d Cir. 1971); *United Slate Workers, Local 36,* 172 NLRB 2248 (1968).

2. For over 30 years the Board and the Courts have developed and employed this distinction. Only if this distinction is made can effect be given Justice Stewart's statement in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 220 (1964) that: "The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them."

7, 13; AFL-CIO Br. p. 6, n. 2) that in-plant food prices fall within the "ordinary meaning" of the Section 8(d) phrase "terms and conditions of employment" because, as Mr. Justice Stewart pointed out in *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 222 (1964), that phrase is commonly understood to encompass "the various physical dimensions of [an employee's] working environment."[3] It is strikingly clear, however, that a construction which equates food prices with the term "working environment" overburdens any connotation fairly derived from the latter concept. Indeed, Mr. Justice Stewart appears to have been thinking in different terms when he wrote the passage upon which the Board and the UAW now rely. He said (379 U. S. at 222):

> In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during these hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment.

Thus stated, the "various physical dimensions of [an employee's] working environment" is a narrow concept that signifies the "what" and "when" of work performed by employees ("work amounts"; "work hours"; "periods of relief") as well as the *immediate* circumstances under which the work is performed ("safety practices"). Beyond such matters, we submit, the concept may not logically be extended. In short, the

3. The argument made by counsel for the Board that in-plant food prices are "wages" within the meaning of Section 8(d) (Board Br. p. 23, n. 22), was not addressed by the Board or the Court of Appeals and, as a *post-hoc* rationalization of counsel, should not be accepted by the Court as a basis for the Board's decision. See *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 443-444 (1965).

prices at which employees buy food, whether in-plant or on the outside, are too far removed from the employees' work stations, both physically and conceptually, to be considered a part of their work environment.[4]

Furthermore, even if the "work environment" concept could be stretched to include the matter of in-plant food prices, the argument that the Board, the

4. In the context of its "working environment" argument, the Board likens "food availability" (and thus food prices) to the following matters which the Board states, citing cases, are all "subject to mandatory bargaining": plant air temperature and quality, restroom privileges and conditions, and employee rental of company-owned housing (Bd. Br. p. 16 and n. 7, pp. 16-17).

Ford agrees that both the temperature and quality of plant air and employees' restroom privileges and conditions are matters that may be encompassed by Mr. Justice Stewart's "working environment" concept. Significantly, however, none of the cases cited by the Board to support its position with respect to such matters turned on, or even mentioned, the latter concept. Even more troubling is the Board's misleading citation of *N. L. R. B.* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962), to support the proposition that the matter of plant air temperature is a mandatory subject of bargaining. For, as the AFL-CIO correctly noted (AFL-CIO Br. n. 2, pp. 6-7), the issue in *Washington Aluminum* was whether a walkout protesting an uncomfortably cold plant temperature was a protected concerted activity within the meaning of Section 7 of the Act; and the case in no way concerned the matter of mandatory bargaining.

Furthermore, neither of the cases cited by the Board with respect to the rental of company-owned housing equated that subject with the "working environment" concept. Rather, both *American Smelting and Refining Co.* v. *N. L. R. B.*, 406 F. 2d 552 (9th Cir. 1969), *cert. denied*, 395 U. S. 935 (1969), and *N. L. R. B.* v. *Lehigh Portland Cement Co.*, 205 F. 2d 821 (4th Cir. 1953), sustained the Board's view that bargaining was required over company-supplied housing because of the particular circumstances that were present—i.e., rents below the prevailing rate charged over a long period of time and the unavailability of alternative housing (*Lehigh Portland*); relatively isolated, company-owned housing in a company town not serviced by public transportation to other locations (*American Smelting*). In addition, compare *N. L. R. B.* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33 (5th Cir. 1953), a case *not cited* in the Board brief, where the occupancy of company-owned housing was held *not* to be subject to compulsory bargaining.

UAW, and the AFL-CIO build upon the concept does not meet Ford's basic position in this case. Ford submits that for a matter to be a mandatory subject of bargaining it must "vitally affect"—as in-plant food prices clearly do not—employees' working conditions. See *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971), and Ford Br. pp. 23-29.[5]

C. In its brief, Ford asserted that bargaining over in-plant food prices is not general labor-management practice (Ford Br. p. 29). Significantly, the Board, the UAW, and the AFL-CIO have not cited to the Court a single collective bargaining agreement which contains a provision setting in-plant food prices or establishing a procedure for bargaining about such prices. Moreover, the Board's statement that bargaining about in-plant food prices is a "wide-spread" industrial practice (Board Br. 23) not only is totally unsupported but is at odds with the Board's statement that "[s]uch [in-plant food price] clauses apparently exist" (Board Br. p. 24, n. 23). Further, neither the UAW nor the AFL-CIO, each of which has access to

5. Respondents seek to limit the "vitally affect" concept set forth in *Allied Chemical & Alkali Workers* to situations in which "the matter in issue directly involves individuals outside the employer-employee relationship" (Board Br. p. 31, UAW Br. pp. 10-13; AFL-CIO Br. pp. 8-9). This argument wholly ignores the fact that in *Allied Chemical & Alkali Workers* it was the Board which first perceived that the effect of retired employees' pension benefits on current employees was direct and substantial enough to "vitally affect" the latter group. See, 177 NLRB at 915-916. It is that conclusion with which the Court disagreed, deeming the effects found by the Board "speculative and insubstantial" at best, but in no way indicating that the "vitally affect" standard should be narrowly confined, as the Board now urges. 404 U. S. at 180. Indeed, the Courts of Appeals, including the Court below, have not limited the "vitally affect" standard to situations in which persons outside the employment relationship are involved. *See, e.g., N. L. R. B.* v. *Ladish Co.*, 538 F. 2d 1267, 1272 (7th Cir. 1976); *Seattle First National Bank* v. *N. L. R. B.*, 444 F. 2d 30, 33 (9th Cir. 1971).

numerous collective bargaining contracts in a wide diversity of industries, points to even a single such agreement setting, or referring to, in-plant food prices.[6]

D. Although the Board, the UAW, and the AFL-CIO argue generally that in-plant food prices should be declared to be a mandatory bargaining subject, only the UAW acknowledges the likely consequences of such a declaration. Thus, the UAW has stated: "Assume *arguendo* that the parties are petty, and fall into economic warfare over the smallest matters. The Act contemplates economic combat. . . ." (UAW Br. p. 20). In fact, should bargaining over in-plant food prices be declared mandatory, the decision would remove employee inhibitions against striking to enforce bargaining demands made with respect to such prices. Thus, "it is lawful to insist [as a condition to any agreement] upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without," *N. L. R. B.* v. *Wooster Division of Borg Warner Corp.*, 356 U. S. 342, 349 (1958); and employees who strike to enforce a demand over a mandatory subject of bargaining have preferential recall rights. *Laidlaw Corp.* v. *N. L. R. B.*, 414 F. 2d 99 (7th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970). Conversely, a strike to enforce a demand on a non-mandatory subject is an unfair labor practice, *N. L. R. B.* v. *Local 964, United Brotherhood of Carpenters, supra*, and employees who participate in such a strike are

6. Indeed, although the UAW surveyed some 101 Local UAW-Ford agreements, it points to only 41 that even deal with "nourishment, normally food services" (UAW Br. p. 18, n. 19). Significantly, the UAW makes no assertion that any such Local agreement deals with food pricing.

Ford has conducted its own examination of *all* its collective bargaining agreements with the UAW, and now reports to the Court that none contains a provision setting or referring to in-plant food prices.

not protected under the Act. *Dobbs Houses, Inc.* v. *N. L. R. B.*, 325 F. 2d 531 (5th Cir. 1963); *American Art Clay Co.* v. *N. L. R. B.*, 328 F. 2d 88 (7th Cir. 1964).

E. The argument of the AFL-CIO (AFL-CIO Br. p. 3) that the acceptance of Ford's position would leave in-plant food prices in the "exclusive control of management" is unpersuasive. In fact, employees have the same means available to them as do consumers for influencing prices, such as boycotting and item substitution. Indeed, that the employees in this case engaged in a boycott to protest food price increases serves to underscore the fact that the employees themselves perceived that the increases affected them as consumers of one source of food, rather than as employees whose conditions of employment changed.

F. Finally, contrary to the Board's contention (Board Br. pp. 12, 22-23), we submit that special deference should not be accorded to the Board's view with respect to in-plant food prices. For, as the Court observed in *N. L. R. B.* v. *Brown*, 380 U. S. 278, 291-292 (1965):

> . . . Courts should be "slow to overturn an administrative decision, "*Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112, but they are not left "to 'sheer acceptance' of the Board's conclusions," *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 803 . . . [R]eview is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he

> deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

To accord deference to the Board's determination would be particularly inappropriate here, we submit, because the Board's decisions on the matter now before the Court have been premised on shifting rationales and have been marked by strong dissents (see Ford's principal brief, n. 9 at pp. 15-16), and have each, except for the one in this case, been overturned by a reviewing court (see Ford Br. pp. 15-21).

II. RESPONDENTS AND THE AFL-CIO HAVE INTRODUCED A NUMBER OF MATTERS IRRELEVANT TO RESOLUTION OF THE FOOD PRICE ISSUE PRESENTED IN THIS CASE.

A. The Board's assertion (Board Br. pp. 25-26) that bargaining should be required about food prices because the employer benefits from the existence of in-plant feeding facilities is unpersuasive. Were this argument to be accepted, bargaining would be required over many nonmandatory subjects. Thus, bargaining could arguably be required over pension benefits for retired employees, *Allied Chemical & Alkali Workers, supra,* because, *inter alia,* it might be said that paying such benefits enhances employee morale and the employer's ability to recruit new employees.[7] Further-

7. The same argument could be made with respect to the matter decided in *Seattle First National Bank* v. *N. L. R. B.*, 444 F. 2d 30 (1971), where the Ninth Circuit held that a bank was not required to bargain over the discontinuance of its policy of providing free to its employees investment services for which it charged its customers. The court said:

(Footnote continued on next page.)

more, Ford does not operate the in-plant food service to make a profit; and nothing in the record suggests that Ford has ever either used in-plant feeding to induce employment or asserted that it should be considered a benefit of employment.[8]

B. In an effort to demonstrate that bargaining ought to be required, the Board has cited a number of decisions dealing with in-plant feeding issues which have no bearing on whether the matter of in-plant food prices ought to be a bargainable subject (Board Br. pp. 17-18).[9] Thus, clearly not relevant to this case is

(Footnote continued from preceding page.)

> We find it difficult to understand how the use of the bank's investment service department by the employees at half-price or free of charge can be within the phrase "terms and conditions of employment." The purchase and sale of securities by employees has little or nothing to do with their employment. The source of funds may or may not originate from employment. In the words of *Fibreboard Paper Products Corp., supra,* the pricing of such services is one of the management decisions "which impinge only indirectly upon employment security and should be excluded" from Section 8(d) matters. (444 F. 2d at 33.)

8. Thus, both *N. L. R. B.* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (7th Cir. 1963) (cited by the AFL-CIO at p. 28 of its brief) and *N. L. R. B.* v. *Inland Steel Co.*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied in relevant part*, 336 U. S. 960 (1949) (cited at p. 16 of the Board's brief, at p. 16 of the UAW's brief, and at pp. 6 and 23 of the AFL-CIO brief) where plans or programs of benefits were represented by the employers to their employees as such, are here irrelevant. Likewise inapposite is *Weyerhaeuser Timber Co.*, 87 NLRB 672 (1949), cited in the Board's brief at pp. 22-23, where meals were sold to employees in a remote lumber camp at below the employer's cost.

9. The Board's circular statement that "when a matter is subject to mandatory bargaining, all of its facets are subject to negotiation" (Board Br. p. 19, n. 15) ignores the fundamental issue of the impact that the particular matter involved has on employees. Moreover, the authorities cited, *Bastian-Blessing, Div. of Golconda Corp.* v. *N. L. R. B.*, 474 F. 2d 49 (6th Cir. 1973) and *Oil Chemical & Atomic Workers* v. *N. L. R. B.*, 547 F. 2d 575 (D. C. Cir. 1977), which deal with changes in health insurance carriers, in no way support the Board's proposition. In *Golconda*

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whether employees will be permitted to eat at some time during the work shift and the duration of lunch periods or breaks (matters plainly encompassed within Section 8(d)'s mandate of bargaining concerning hours of employment);[10] whether meal periods will be paid or unpaid time (which clearly involves employee wages);[11] or whether unit employees will be required to clean existing lunch areas (a matter plainly involving employees' job duties).[12]

Also distinguishable from, and not relevant to, the question presented in this case are matters which bear directly upon management's right to discipline—to use an example chosen by the UAW, whether an employee may be disciplined for producing too much scrap (UAW Br. p. 19, n. 21)—and those cases cited by the Board which deal with whether a Christmas or other bonus is so frequently and customarily paid

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the change of health insurance coverage from an established insurance company to a self-insured program resulted in substantial changes in coverage. 475 F. 2d at 51-52. In *OCAW*, the Fifth Circuit observed that the change in insurance carriers "effected many changes in coverage" 547 F. 2d at 582. *Compare Connecticut Light & Power Co.* v. *N. L. R. B.*, 476 F. 2d 1079, 1083 (2d Cir. 1973), a case not cited by the Board, holding that the employer was not obligated to bargain about a change in insurance carrier for medical insurance coverage for its employees because, under the test set forth in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971), the change did not have a significant effect on employees.

10. *Cosmo Graphics, Inc.*, 217 NLRB 1061 (1975); *Bralco Metals, Inc.*, 214 NLRB 143 (1974); *Missourian Publishing Co.*, 216 NLRB 175 (1975); *D & C Textile Corp.*, 189 NLRB 769 (1971).

11. *Hasty Print, Inc., d b/a Walker Color Graphics, Inc.*, 227 NLRB 455 (1976); *Florida Steel Corp.*, 231 NLRB No. 135 (1977); *Bralco Metals, Inc.*, 214 NLRB 143 (1974).

12. *Cosmo Graphics, Inc.*, 217 NLRB 1061.

that it is properly viewed as "wages" or a "condition of employment."[13]

Likewise having no relevance here is the fact that an arbitrator might hold that a collective bargaining agreement voluntarily entered into prohibits discontinuance of a practice of providing certain foods free of charge to employees (Board Br. p. 24).[14]

13. See *N. L. R. B.* v. *Niles-Bement-Pond Co.*, 199 F. 2d 713, 714 (2d Cir. 1952) ("Where, as here, the so called gifts have been made over a substantial period of time and in amount have been based on the respective wages earned by the recipients, the Board was free to treat them as bonuses not economically different from other special kinds of remuneration . . ."); *N. L. R. B.* v. *Citizens Hotel Co.*, 326 F. 2d 501, 503 (5th Cir. 1964) (Board's view supportable "considering the regularity of the gift, the existence of a formal policy as to the eligibility of recipients and ascertainment of the dollar amounts, preemployment reference to the bonus as an inducement to prospective employees . . ."). Not cited by the Board is *N. L. R. B.* v. *Wonder State Manufacturing Co.*, 344 F. 2d 210 (8th Cir. 1965), which holds irregularly paid Christmas bonuses are not a mandatory subject.

Also distinguishable are *Fleming Mfg. Co.*, 119 NLRB 452 (1957), and *Preston Products Corp.*, 158 NLRB 322 (1966), *enforced*, 392 F. 2d 801 (D. C. Cir. 1967) *cert. denied*, 392 U. S. 906 (1968), since in both cases the Board found employers violated Section 8(a)(1) of the Act by, in addition to many other unfair labor practices, changing in-plant food services in order to discourage employees from exercising protected Section 7 rights. See Ford Br. p. 36, n. 51. Moreover, in the latter case, the Court of Appeals did not expressly consider the food service improvements in enforcing the Board's order. Likewise not relevant here is another case relied on by the Board, *O'Land, Inc.*, 206 NLRB 210 (1973), finding the employer had unlawfully refused to bargain when instituting a policy of providing free meals to employees not participating in an on-going unfair labor practice strike. The Board concluded: "In th[is] context . . . the giving of free meals had the appearance to the strikers of still another bad faith unilateral action, designed in this case to reward employees for not striking." 206 NLRB at 216.

14. The Board's citation of the following arbitration decisions, each of which involve the interpretation of a collective bargaining agreement, is thus misleading: *Universal Form Clamp Co.*, 68 LA 1223 (Miller, 1977) (contract provision interpreted to require employer to provide free coffee, as in the past, even though con-

(Footnote continued on next page.)

C. Whatever may be the proper rule when employees have no alternative food sources available (Board Br. pp. 21-22, n. 18; UAW Br. p. 3, n. 3; AFL-CIO Br. pp. 24-25, n. 10), record evidence shows that Ford's employees were not in that position. See Ford's principal brief at pp. 31-32. Further, assuming *arguendo,* that spoilage of food left in employee lockers at the Ford plant was a problem, techniques and food products are available that permit employees to ensure that they have fresh food at work. See, for example, "Packed Lunches for Everyone," *Woman's Day,* September 27, 1978, pp. 33-40, CBS Publications (New York, 1978), reproduced in part in the Appendix to this Brief, which describes some of these products and techniques. In the same vein, the venerable *All New Fannie Farmer Boston Cooking School Cookbook,* Bantam paperback at 564 (10th Ed., New York, 1965), states: "For lunchboxes and picnics. Frozen sandwiches thaw completely in about 4 hours and taste fresher (even though made days or weeks before) than sandwiches made the same day which have not been refrigerated."[15]

(Footnote continued from preceding page.)

tract stated only that employer would furnish coffee, not that it would be free); *Greater Los Angeles Zoo Ass'n,* 60 LA 838 (Christopher, 1973) (employer held to have violated contract by discontinuing free meals even though contract did not expressly require free meals); *Alpena General Hospital,* 50 LA 48 (Jones, 1967) (employer found to have violated contract by discontinuing past practice of allowing certain employees a free meal even though contract contained no express provision to that effect); *Lutheran Medical Center,* 44 LA 107 (Wolf, 1964) (to the same effect as preceding case); *Hilton Hotels Corp.,* 42 LA 1267 (Hanlon, 1964) (interpreting contract provision requiring that meals which employer had, prior to the execution of the bargaining agreement, provided free to its employees be "wholesome, hot, palatable and balanced").

15. Although the UAW argues (UAW Br. p. 3, n. 3) that Ford did not raise its evidentiary claim with respect to food

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III. THE ORDER THAT FORD BARGAIN ABOUT "FOOD SERVICES" WAS IMPROPER

The Board incorrectly asserts (Board Br. p. 16, n. 6, p. 29, n. 33) that Ford has conceded that it must bargain about many aspects of food services. Ford has made no such concession. What it has conceded is that it regarded sanitary conditions—which could affect all employees, not only those who use the cafeterias and vending machines—as a mandatory subject of bargaining. See A. 63. That Ford voluntarily bargained in the past about certain aspects of in-plant food services as permissive bargaining subjects does not require that Ford continue to do so. See Ford Br. p. 31.

In its principal brief (pp. 35-36), Ford argued that the Board's order, as enforced by the Court of Appeals, failed to define with sufficient particularity the "food services" about which Ford was directed to bargain. For the Board to respond, as it does (Board Br. p. 29, n. 33), that the meaning of its order may be fleshed out in subsequent dealings between the parties, is not a sufficient answer—especially in view of the fact that Ford is subject to being held in contempt for disobedience. Furthermore, the Board's assertion that the "elements of the term 'food services' have already largely been defined by prior bargaining" (Board Br. p. 20, n. 33) is insupportable, for, if Ford and the Union agreed about the meaning of the Union's re-

(Footnote continued from preceding page.)

spoilage in the proceedings below, Ford in fact objected before the Administrative Law Judge to the admission of hearsay evidence pertaining to the matter (see Ford's Br. pp. 32-33, n. 50) and in its brief to the court below (p. 25) likewise contended that the Board's treatment of the matter was not "supported by the facts."

quest, this dispute about "food services" would not have arisen.[16]

IV. CONCLUSION.

For the reasons set forth herein and in Ford's main brief, the judgment of the Court of Appeals should be reversed and enforcement denied the Board's order.

Respectfully submitted,

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16. The contention (Board Br. p. 29, n. 33) that Ford may not now challenge the scope of the Board's order because it did not do so below is without merit. First, Ford could not have made this claim before the Board because it prevailed before the Administrative Law Judge. Second, Sections 10(e) and (f) of the Act foreclose from consideration only those objections which have "not been urged before the Board, its member, agent or agency." Third, by arguing in the Court of Appeals that it had already fulfilled whatever bargaining duty might be thought to exist, Ford placed squarely in issue the scope of an appropriate order relating to food services.

APPENDIX

WOMAN'S DAY, September 27, 1978,
pp. 130-140
The Collector's Cookbook
Woman's Day Kitchen No. 265
Packed Lunches
for Everyone

Packing lunch can be a real inflation fighter and lots of fun too. No one ever needs to be bored with a packed lunch; a little imagination, a little planning and you'll have the winning combination every time. The cookbook's menus and recipes cover light lunches, hearty lunches and low-calorie lunches—a good assortment of each, with tips on preparing and packing. Some of the light lunches are good for children to take to school. Some hearty lunches are good for hard work or harder play. Our suggestions will help you make the best possible use of your food, time and money.

* * * * *

PACKING TIPS

* Save plastic containers (from margarine, cottage cheese or yogurt) and small jars for salads and other moist foods. Clean spice jars or leakproof pill containers are good for salad dressings, catsup or mustard.

* To avoid morning rush, pack lunch boxes the night before and refrigerate, omitting hot or frozen food (add the next morning).

* For economy, buy large bags of potato chips, corn chips and pretzels. Rebag in small plastic bags.

* Purchase beverages at work or at school. Or pack small frozen cans of fruit or vegetable juice with lunch. They'll keep other foods cold, thaw and still be cold by lunchtime.

* * * * *

* Small wide-mouth thermos jars are worthwhile investments for using up main-dish leftovers (chili, soups, stews, casseroles etc.).

NO REFRIGERATION NEEDED

* Dehydrated soups (individual servings of instant soups, and soup and noodles in a cup)
* Jerky or pepperoni sticks
* Canned potted meats
* Canned Vienna sausage
* Canned meat spreads (deviled ham, corned beef, chicken, liverwurst and roast beef)
* Canned luncheon meat
* Canned tuna, salmon, shrimps and sardines
* Some pasteurized process cheese spreads (unopened)
* Peanut butter, jelly and jam
* Potato chips or sticks, chow mein noodles
* Crackers
* Canned fruits
* Fresh or dried fruits
* Canned puddings

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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In the Supreme Court of the United States

October Term, 1978

No. 77-1806

FORD MOTOR COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

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This brief *amicus curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 107 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Where employees have selected a collective bargaining representative, Congress has determined "that free opportunity for negotiation with [the] accredited representative * * * is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 45.) "The basic theme of the [National Labor Relations] Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." (*Porter Co.* v. *NLRB*, 397 U.S. 99, 103.)

Nonetheless, in this case the petitioner argues that this Court should endorse the view that matters that fit comfortably within the statutory terms defining mandatory bargaining subjects should be determined by employer fiat and not by collective bargaining, if in the Board's, or a reviewing court's, judgment "the matter * * * lack[s] sufficient significance to give rise to a bargaining obligation * * *." (Pet. Br. 11.) But Congress has placed its trust in the parties' common sense and self-interest to settle industrial disputes rather than in administrative or judicial determinations of what labor-management disagreements are important or "trifles" (*Westinghouse Electric Corp.* v. *NLRB*, 387 F.2d 542, 550 (C.A. 4)).

Congress declared the statutory right of employees to bargain collectively through representatives of their own choosing with respect to wages, hours and working conditions in order to enable the employees to establish *jointly* with management the basis on which the employees would provide their labor. It thus left it to each party to determine

for itself the relative importance of each matter in dispute and on that basis to decide whether to make a concession in return for obtaining agreement, or to stand fast, and resort to self-help if need be, with the sacrifices and risks that entails. An administrative or judicial determination that an issue is not sufficiently significant to be a subject of collective bargaining to that extent curtails the congressionally preferred process for settling labor disputes and leaves the matter in the exclusive control of management, although without explaining why, on principle, supposed "trifles" should be resolved according to the employer's wishes rather than the employees'. Such determinations cannot therefore be reconciled with Congress' judgment that government is not competent to evaluate the merits of the contending positions of labor and management concerning the basis of their relationship.

In part 1 of our argument we show that the language of §§8(a)(5) and 8(d) of the Act and this Court's decisions construing those provisions establish that proposals going to the basis of the employer-employee relationship are mandatory subjects of bargaining, and that in-plant food prices are part and parcel of that relationship. In part 2 we demonstrate that the Act's legislative history and its animating purposes—to encourage collective bargaining and to preclude governmental regulation of employment conditions—further buttress the conclusion that petitioner violated its bargaining obligation here. Finally, in part 3 we show the inadequacy of the arguments which petitioner draws from certain lower court decisions and from decisions of this Court not in point.

The sum of our demonstration is that petitioner is entirely correct that "Section 1 of the Act makes clear [that]

the Act was designed and intended to preserve and promote industrial peace and stability and to avoid labor strife * * * [and] that whether a specific matter is a mandatory bargaining subject is to be measured, in part, by reference to this purpose." (Pet. Br. 27.) But that section, and the entire Act, make no less clear that the means to that end chosen by Congress is to encourage the settlement of labor-management disputes by free collective bargaining, rather than to permit such disputes to fester by privileging "refusals to confer" (*Jones & Laughlin,* 301 U.S. at 42) on matters relating to the employer-employee relationship that persons other than the affected employees deem "trifles".

ARGUMENT

1. We begin, of course, with the text of the statute, which petitioner quotes but does not discuss. Section 8(a)(5) of the Act declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." Section 8(d) defines the duty to bargain to be "the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours and other terms and conditions of employment * * *." As this Court declared in *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203:

> "Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Ins. Co.,* 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain . . .".

> [379 U.S. at 210 quoting *Labor Board* v. *Borg-Warner Corp.,* 356 U.S. 342, 349.]

And the very decisions of this Court which have held particular subjects to be *outside* § 8(d) have stated the test for coverage to be whether the provision "regulates the relations between the employer and the employees". (*Borg-Warner, supra,* 356 U.S. at 350.) See also, *Chemical Workers* v. *Pittsburgh Glass,* 404 U.S. 157, 178: "In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees".

The subject of how much employees must pay for food bought at an in-plant cafeteria or from in-plant vending machines and consumed during their lunch hour or on breaks is plainly "an aspect of the relationship between the employer and the employees". The core of that relationship is the price at which the employees sell their labor. That price is rarely set entirely in cash wages. Rather it includes a variety of benefits that increase the employees' well-being —hospitalization, payment of doctor, dentist and medical bills, pensions, etc. And, just as the employee whose collective agreement provides for X-dollars an hour plus health coverage is better off than an employee who receives only X-dollars an hour, so an employee whose collective agreement provides for X-dollars an hour plus a decent meal in a pleasant place, both paid for by the employer, is better off than an employee who receives only X-dollars an hour.[1]

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[1] The foregoing demonstrates that the contention that an "employee who purchases food from a cafeteria or vending machine located at the place of his or her employment is in essentially the same position as the employee who purchases food in a nearby public restaurant" (Pet. Br. 26) proves too much. Health insurance

Any profit the employer makes from in-plant food services is *pro tanto* a diminution of his employees' wages, and any cost to the employer is a form of employee compensation. It follows, we believe, that when employees seek their employer's agreement that he will provide a time to eat, a place to eat, and the food consumed they are raising mandatory bargaining subjects.[2] The employer, of course, has

and retirement and survivors benefits can also be obtained in the open market; yet it is established that these are mandatory subjects of bargaining. (See *e.g., Chemical Workers* v. *Pittsburgh Glass, supra,* 404 U.S. at 159 and n. 1.) Rather than facing up to the holdings that such benefits are within § 8(d) petitioner simply omits them from its otherwise fairly exhaustive list of matters which have been held to within the scope of the phrase "terms and conditions of employment" (Pet. Br. 23-25, text and notes at ns. 15-32). *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (C.A. 7.), *cert. denied on this point*, 336 U.S. 960, the leading case on the duty to bargain over pensions, for example, is cited only for the proposition that "compulsory retirement age" is a mandatory bargaining subject (Pet. Br. 24, text and note at n. 27).

[2] For the reasons stated in the text, the subject at least in part also comes within the statutory words "wages" and "hours". However, we need not press that point because, at the very least, the proximity of this subject to wages and hours reinforces the proposition that it involves "terms and other conditions of employment". (Compare *Inland Steel, supra.*)

We note also that the existence of an adequate opportunity to eat during the working day is obviously a matter affecting the health of the employees, and since it plainly affects their morale and efficiency, relates also to the quality of their job performance. Moreover, the presence and the quality of eating facilities is a part of the employees' working environment is also an element of the employer-employee relationship, as indeed this Court has recognized in *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 15-16. The issue in *Washington Aluminum* was whether a concerted refusal to work in, and protest of, an unheated room was protected activity; this turned on the scope of the term "labor dispute" in

the right to resist each and every one of these bargaining demands. And, the ultimate solution—including an employer guarantee that certain food will be provided at a certain price—will be the product of the parties' relative strength, their evaluation of the relative importance of the issue, and, to the extent a compromise is reached, their ingenuity and flexibility.[3]

Petitioner places heavy reliance on certain language in Mr. Justice Stewart's concurring opinion in *Fibreboard, supra,* 379 U.S. at 217-226. (Pet. Br. 22-23.) If the difference between the views of the opinion of the Court and those of the concurring Justices were germane to the issues in the present case, the governing statement of the law would be, of course, the Court's opinion, which petitioner merely notes in passing. (Pet. Br. 25, n. 31.) But those differences as to how to harmonize the free enterprise and free collective bargaining systems are presently irrelevant, for the concern addressed in the concurring opinion—that mandatory bargaining about some forms of subcontracting would impermissibly interfere with "managerial decisions, which lie at the core of the entrepreneural control" (*id.* at 223)—lies at the opposite end of the spectrum from petitioner's

§ 2(9) of the Act which, as we develop below, is almost identical in its operative language to § 8(d).

[3] Although we have stressed the point of principle that the scope of the duty to bargain does not depend on the importance of the employees' or the employers' proposal, we by no means accept the contention that cost of food which employees purchase in the plant does not have a significant impact on them. (See Pet. Br. 25.) A simple comparison will make our point: if only the price of the hot courses offered (or of sandwiches, etc.) is raised by 10¢, the weekly increase in cost to each employee who buys his lunch at a plant cafeteria is 50¢ a week; this is more than he gains from a 1¢ an hour wage increase.

concern in this case. Here Ford nowhere contends that the price which its employees must pay for in-plant food service is one "of those management decisions which are fundamental to the basic direction of a corporate enterprise * * *" (*id.*). On the contrary, petitioner's principal point is that this is too trivial a matter to call for bargaining. But the concurring opinion in *Fibreboard* contains not the slightest suggestion that a matter which bears on the employer-employee relationship is to be excluded from the mandatory subjects of bargaining because either party, the Board, or the courts consider it to be insignificant.

Petitioner's reliance on *Chemical Workers* v. *Pittsburgh Glass, supra,* is likewise misplaced. In *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-294, this Court recognized that the "point" of a bargaining demand that appears to address a subject other than the employer-employee relationship may in fact be the bargaining employees' own wages, hours and working conditions. As the *Chemical Workers* Court explained, "Although normally matters involving individuals outside the employment relationship do not fall within [the] category * * * [of] * * * issues that settle an aspect of the relationship between the employer and employees * * * they are not wholly excluded". (404 U.S. at 178.) The limit of that doctrine is that such matters must "vitally affect the 'terms and conditions' of * * * the bargaining unit employees' * * * employment." (*Id.* at 178-179.) The *Oliver-Chemical Workers* test thus states a mediating principle between an interpretation of §8(d) which looks only to whether a bargaining demand is formally addressed to the employer-employee relationship, and an interpretation which looks to whether a demand not so addressed raises an issue that in any way affects the bargaining employees. The first, of course, invites manipulation and, as *Oliver* teaches, would stultify bargaining even over wages; the second, given our interdependent economy, threatens the principle that the bargaining "obligation extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes; which the union represents" (404 U.S. at 164). Nothing this Court has said or done invites the Board and the lower courts to evaluate the merits of bargaining demands where the competing consideration which necessitated the *Oliver-Chemical Workers* inquiry are not present. And where the bargaining demand is plainly addressed to the employer-employee relationship, there is no consideration—and petitioner has proffered none—which would override the twin policies stated at the outset of the argument which militate against government evaluation of the merits of the parties' bargaining position (see pp. 2-3, *supra*).

In sum, the Act's language setting the scope of mandatory bargaining, as interpreted by this Court, appears to be more than broad enough to include bargaining over in-plant cafeteria and vending machine prices. It would, therefore, require a powerful showing from the Act's legislative history to read those words so restrictively as to exclude that subject. But that legislative history calls for a generous rather than a restrictive interpretation. Indeed, it establishes that the words "terms and conditions of employment" were used in their broadest sense.

2. (a) Section 9(a), to which §8(a)(5) refers, has, from the beginning, provided, and still provides, as follows:

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall

> be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment* * * *. [Emphasis added.]

And § 2(9) defines the term "labor dispute" as including:

> any controversy concerning *terms, tenure or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. [Emphasis added.]

That definition, in turn, was adopted *in haec verba* from § 13(c) of the Norris-LaGuardia Act, 47 Stat. 70 *et seq.*, 29 U.S.C. § 101 *et seq.* Speaking of § 13(c), Mr. Justice Black wrote: "Congress made the definition broad because it wanted it to be broad." (*Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 335, a case in which the issue was the scope of the phrase "terms and conditions of employment". See *id.* at 336.) This Court has recognized that this language has the same meaning in Norris-LaGuardia and the NLRA. (See *Fibreboard, supra,* 379 U.S. at 210, citing *Railroad Telegraphers.*)

In considering what became § 8(d) of the Act, the 1947 Congress considered and rejected proposals for narrower words, offered in an effort to curtail the scope of labor-management negotiations. The bill which passed the House (the Hartley bill) had enumerated the particular subjects which were to be encompassed within the terms "collective bargaining" and to constitute the scope of bargaining required by the Act.[4] The Senate bill in contrast took the

[4] H.R. 3020, 80th Cong., 1st Sess., § 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167 (hereafter "Leg. Hist."); House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. Section 8(b)(3) of the Hartley bill would have prohibited "strike[s] or other concerted interference with an employer's operations, an object of which is to compel the employer to accede to the inclusion in a collective-bargaining agreement of any provisions which under § 2(11) is not included as a proper subject matter of collective bargaining." (1 Leg. Hist. 179.)

approach of § 8(d) as enacted except that the phrase "working conditions" was used. This phrase was changed to "conditions of employment" in response to Senator Wagner's fear that "working conditions" would narrow the scope of collective bargaining. Sen. Wagner said:

> By substituting the narrower term "working conditions" for the present broader term "conditions of employment", the bill would narrow the scope of collective bargaining to exclude many subjects, such as, perhaps, pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism. [1 Leg. Hist. 998]

The Conference Committee adopted the Senate's provision in preference to the Hartley bill's restriction on the scope of the bargaining obligation. And, while the House bill had dropped the definition of "labor dispute," the conferees also preserved the broad definition of that term. In light of this history, it is clear that a narrow reading of the statutory phrase would override the Congressional judgment. Compare *Labor Board* v. *Drivers' Local Union,* 362 U.S. 274, 288-289 (relying on the Conference Committee's rejection of the Hartley bill's limitation on the right to picket); *Newspaper Pub. Assn.* v. *Labor Board,* 345 U.S. 100, 108-109 (contrasting the Conference Committee's narrow provision on "featherbedding" with the sweeping prohibition of the Hartley bill).

Indeed, petitioner's position here entails a more severe restriction on collective bargaining than that proposed in the Hartley bill. The House Report explaining § 2(11) of that bill stated:

> Reference has already been made to liberties the Board has taken with the term "collective bargaining" due to the absence from the present act of language defining the scope of bargaining. The last paragraph of § 2(11) cures this defect, limiting the scope of bargaining by either employees or unions to matters of *mutual* concern. [H. Rep. No. 245, *supra*, at 22, 1 Leg. Hist. 313 (emphasis in original).]

It is precisely our point that whether, how and at what price food is provided at the plant are matters of "mutual concern" as to which the employer must bargain.

Against all this petitioner argues:

> In the 1947 revision of that Act, the House bill contained a detailed list of mandatory bargaining subjects, which did not include in-plant food prices and services, and confined the duty to bargain to the subjects listed. • • • [t]he Senate's amendment did not set forth a definition of collective bargaining. In conference between the House and Senate, the specific listing in the House bill was dropped and the Senate version was accepted. • • • However, the accompanying Conference Report shows that the intent of the Congress was to retain the restrictive approach of the House bill. Thus the Report stated with respect to the Senate version, and therefore with respect to the present Section 8(d), that while "this section did not prescribe a purely objective test of what constituted collective bargaining as did the House Bill, [it] had to a very substantial extent the same effect . . ." [Pet. Br. 21-22, footnotes omitted.]

But when one reads the entire sentence in the House Conference Report from which petitioner plucked the phrase on which its argument rests, that argument turns to dust:

> Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect *as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.* [H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34, 1 Leg. Hist. 538. Emphasis added to show the omitted final portion of the sentence quoted at Pet. Br. 22.]

And, if more is needed, Justice Stewart's concurring opinion in *Fibreboard,* pressed into service by petitioner for a proposition not there asserted, is relevant in that it expressly rejects petitioner's reading of the House Conference Report:

> The conference report accompanying the bill said that although this section [8(d)] "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect . . ." I LMRA 538. Though this statement refers to the entire section, it is clear from the context that the focus of attention was upon the procedures of collective bargaining rather than its scope. [379 U.S. at 221, n. 5.]

(b) The Act's language and legislative history teach two additional lessons relevant here, each of which supports the conclusion that in-plant food prices are a mandatory subject of bargaining.

First, in § 1 of the Act, adopted in 1935:

> It is • • • declared to be the policy of the United States to eliminate the causes of certain substantial

> obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining * * *.

Congress adopted this policy because "Refusal to confer and negotiate has been one of the most prolific causes of [industrial] strife". (*Jones & Laughlin, supra,* 301 U.S. at 42.) As early as 1902 an industrial commission report noted:

> The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other. [H.R. Doc. No. 380, 57th Cong., 1st Sess., 844 (1902).]

As this Court added in *Fibreboard, supra*: "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation". (379 U.S. at 211.) Accordingly the Court there read §8(d) so as to enhance rather than curtail the statutory obligation to negotiate.

The statement of policy in the Hartley bill would have eliminated all reference to encouraging collective bargaining. (See 1 Leg. Hist. 160.) But the 1935 statement of policy (quoted above) was reaffirmed in 1947, despite other changes in §1. For, in Senator Taft's words, twice cited as authoritative by this Court:

> Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on the free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. * * * [2 Leg. Hist. 1007, quoted in *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 395, n. 21; see also *Bus Employees* v. *Missouri,* 374 U.S. 74, 82 n. 9, quoting a subsequent passage to the same effect.]

The interpretation of §8(d) for which petitioner contends is wholly inconsistent with Senator Taft's reaffirmation of the importance of the employees' freedom to strike. Excluding from mandatory bargaining some aspects of the employer-employee relationship to that extent deprives the employees of the right to protect themselves by collective action against what they consider to be "arbitrary and unfair treatment". (See *Jones & Laughlin,* 301 U.S. at 33.[5])

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[5] Mr. Chief Justice Hughes there recalled:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209.

Second, in that floor statement Senator Taft made it plain that the 1947 Congress' support of free collective bargaining was the product not only of trust in that system but also of distrust in government regulation of wages, hours and working conditions:

> We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy. [2 Leg. Hist. 1007.]

In this regard the 1947 amendments continued and emphasized a point implicit in the original Act:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. * * * [I]t was [also] recognized from the beginning that agreement might in some cases be impossible and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. [*Porter Co.*, 397 U.S. at 103-104.]

Indeed, the office of the portion of §8(d) that writes the good faith test of collective bargaining into the Act is to make it "clear that the Board may not, either directly or

indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 404.) See also *Labor Board* v. *Insurance Agents*, 361 U.S. 477, which emphasizes that "the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining * * *", and in consequence that §8(d) was enacted "to prevent the Board from controlling the settling of the terms of collective bargaining agreements." (*Id.* at 486, 487.)

This limitation on the authority of the Board and the courts does not negate the limits imposed on the scope of mandatory subjects any more than it disables the Agency, subject to judicial review, from enforcing "the principle that [the parties] are bound to deal with each other in a serious attempt to resolve differences and reach a common ground" (*Insurance Agents*, 361 U.S. at 486). Section 8(d) in its entirety does, however, makes it plain that the Board and the courts do not have the authority to substitute their views as to what is desirable for the parties' view. Yet, once the Board and the courts depart from objective criteria, such as whether the issue is one relating to the employer-employee relationship, rather than the internal affairs of either party (cf. *Borg-Warner, supra,* 356 U.S. at 350), to whether the aspect of the employer-employee relationship raised is significant or trivial, they must inevitably resort to making the kind of policy determinations which Congress directed them to eschew.

In *Westinghouse, supra,* the Fourth Circuit said that in construing §8(d): "Balanced and effective collective bargaining should be the ultimate objective." (387 F.2d at

550.) That court thereby unconsciously echoed the rhetoric the Board employed in *Insurance Agents' International Union,* 119 NLRB 768, 772, which was expressly disapproved by this Court on review, 361 U.S. at 497, text and note at n. 29.[6] In *Insurance Agents'* the notion of "balanced bargaining power" was disapproved because "if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." (*Id.* at 490.) The *Westinghouse* reasoning, which petitioner embraces here, actually compels "the Board's entrance into the substantive aspects of the bargaining process" through the making of value judgments that grant the employer the right to set "substantive terms" without bargaining at all.

Our argument to this point, and the meaning of §8(d) were lucidly summarized by the present Chief Justice, writing for the Court of Appeals in *Fibreboard*:

> The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See United Steelworkers v. Warrier & Gulf Nav. Co., 363 U.S. 574, 580-581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). By guaran-

[6] [The Board] has sought to introduce some standard of properly "balanced" bargaining power, or some new distinction of justifiable and unjustifiable, proper and "abusive" economic weapons into the collective bargaining duty imposed by the Act. • • • We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced. [Footnotes omitted.]

> teeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conductive to industrial harmony and eliminate costly industrial strife which interrupts commerce.
>
> In framing Section 8(d) of the Act, 29 U.S.C. § 158 (d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. [*East Bay Union of Machinists Local 1304* v. *NLRB,* 116 U.S. App. D.C. 198, 201, 322 F.2d 411, 414, affirmed, *sub. nom. Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 211.]

3. In part II of its brief (pp. 29-35), petitioner dismisses as irrelevant a series of factors which, in the Court of Appeals' view distinguish the present case from prior decisions in which that court and other lower courts had held that bargaining over in-plant food prices is not mandatory. We agree that the duty to bargain does not turn on the presence or absence of these factors; but we draw therefrom the opposite conclusion—*viz.,* that the earlier Court of Appeals' decisions were erroneous and that the distinctions the court below drew are unnecessary to support the correct result it reached. Indeed, when one strips away

those elements which petitioner now says are irrelevant from the circumstances on which the Fourth Circuit relied in the leading *Westinghouse* case (387 F.2d 542), all that remains is the untenable proposition that in-plant food prices are mere "trifles" (*id.* at 550) and for that reason are not a mandatory bargaining subject.

(a) The Courts of Appeals in *Westinghouse* and *NLRB* v. *Ladish Co.*, 538 F.2d 1267 (C.A. 7) relied in part on the employers' asserted inability to set the price at which food was sold to the employees in the plant. The *Westinghouse* court believed that this meant there could only be "fictional bargaining", which the Act does not require. (387 F.2d at 550.)

Petitioner argues first that "the peculiarities of the particular agreement [between the employer and the food service contractor] under which food is provided are clearly irrelevant," and then that "Ford lacked the power to establish food prices." (Pet. Br. 30.) The latter assertion raises an issue of fact, which has been decided against petitioner by the Board and the Court of Appeals, and which does not warrant further review.[7] Thus it would avail Ford nothing even if §8(d) were read to exclude food prices from bargaining where the employer has left the price to the contractor's unfettered decision. But we do not wish to leave unanswered the *Westinghouse* court's "fictional bargaining" point which petitioner eventually adopts. (Pet. Br. 30-31.)

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[7] See e.g., *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502; *South Prairie Constr. Co.* v. *Operating Engineers*, 425 U.S. 800, 803-804. That the Board's finding was correct is clear from the terms of the agreement between Ford and ARA, joint exhibit 21 quoted at Pet. Br. 5-6.

We note at the outset that it must be a rare, if not totally imaginary case, in which the employer relinquishes all control over quality and price of food served on its premises to its employees, and lacks bargaining power to cause the contractor voluntarily to improve quality and/or lower prices. After all, only an employer wholly indifferent to the welfare of his employees—and willing to risk undermining their morale and productivity—would view with equinimity their being over-reached by the contractor. And only a most unusual contractor who would insist on the letter of his contractual rights knowing that when the contract terminates, the employer may choose not to renew it.

But even in the largely suppositious situation of an employer who has given up all control over the price charged by the contractor, bargaining would be far from "fictitious". For the employer and the union could bargain about the amount (or proportion) of any price increase which would have to be paid for by the employer *as part of the employee's compensation.* The subsidy which Ford here provides to the food service operations (Pet. Br. 31) and the possibility of a profit by the employer (*id.*) are instructive because they demonstrate that the cost of the food to the employees is, *at bottom*, a part of the economic package Ford offers to its employees for their labor. Indeed, in referring to its collective agreement with the UAW, and the like agreements elsewhere, which provide for cost of living adjustments in the employees' wages (Pet. Br. 26-27), petitioner appears to recognize the degree of economic equivalence between wages and the bargaining demand at issue here.

The First Circuit in *NLRB* v. *Package Machinery Com-*

pany, 456 F.2d 936, 938 made the same point by characterizing a proposal for bargaining over in-plant food prices as a "demand from a union that the company should contribute to the expenses of lunch or snacks for those who do not wish to bring their lunch from home, or to take the trouble to drive to a nearby restaurant".[8] And yet that court held that bargaining over the company's contribution is not mandated by the Act:

> If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages, particularly when half of the employees do not use the company restaurant. In any event, on so thin a record we do not believe we should endorse so broad a principle. [*Id.*]

It is, we submit, precisely such judgments as to what would be "more appropriate to bargain over" that Congress left to employers and employees, rather than to the Board and the courts.

(b) Another of the points made by the *Westinghouse* and *Ladish* courts was that because there was more than one union in the plant, bargaining about food prices would be too cumbersome. (See Pet. Br. 35.) An identical argument was made and rejected in the first case which held

[8] See also *id.* at 937:

> The union seeks to debate simply the extent to which the company must subsidize the cost:[5]
>
> [5] To this extent a substantial red herring is sought to be introduced into the case by National Automatic Machines Assoc., which has submitted an amicus brief. The question is not whether the union is to sit down with the concessionaire in its day by day pricing, but is whether the union has a right to bargain over the bill which the company must pick up as a result of charging the employees below cost.

bargaining about pensions to be mandatory. In *Inland Steel* v. *NLRB*, (170 F.2d 247 (C.A. 7), cert. denied on this point, 336 U.S. 960), the company argued that it presently had a single pension plan for all its employees, and that it would not be feasible to adopt separate plans for its organized and its unorganized employees. The Court of Appeals approved the Board's rejection of that argument:

> We also are of the view that the bargaining requirements of the Act include all retirement and pension plans or none. Otherwise, as the Board points out, "some employers would have to bargain about pensions and some would not, depending entirely upon the unit structure in the plant and the nature of the pension plan the employer has established or desires to establish." Such a holding as to the Act's requirements would supply the incentive for an employer to devise a plan or system which would be sufficiently comprehensive and difficult to remove it from the ambit of the statute, and success of such an effort would depend upon the ingenuity of the formulator of the plan. We are satisfied no such construction of the Act can reasonably be made. [170 F.2d at 249.][9]

Thus, bargaining about a subject is not to be denied merely

[9] In this Court, Inland Steel stressed this point, arguing in part:

> Under the Act bargaining units are set up without regard to the scope of retirement and pension plans. The applicable statutory provisions as administered by the Board since the Act was passed have in hundreds of cases produced a multiplicity of bargaining units in a single company, particularly in large industrial concerns, as distinguished from single company-wide units. • • •
>
> The order of the Board, enforced by the decree of the court below, requires petitioner upon request to bargain collectively with the Union as the exclusive representative of all its employees in the bargaining unit in question with respect to its pension and retirement policies. Petitioner's pension and retire-

because a potential agreement, or even the most desirable potential agreement, would affect other employees of the same employer who are outside the bargaining unit. The statutory rights of one set of employees is not to be diminished because of the statutory rights of other employees; nor can these statutory rights be set off against each other to deprive both sets of employees of the right to bargain and to leave the matter to the exclusive control of the employer, thereby defeating the rights of all the employees.[10]

ment policies are embodied in its retirement and pension plan. Such policies and the plan which embodies them are, and have been since the plan was instituted in 1936, company-wide in scope. The Board's order would thus require petitioner to bargain with the Union concerning matters lying beyond the unit which it represents—a result clearly unlawful, since the bargain made with that Union would bind the petitioner to impose it on employees in other units having other bargaining representatives.

If it be argued that the Board's order requires the petitioner to bargain concerning retirement and pension policies applicable solely to the employees in the unit represented by the Union, then the effect of the decision will be to destroy the petitioner's company-wide plan, and all existing plans in this country which similarly extend beyond a single bargaining unit. A result so drastic, in view of the other considerations herein presented, would appear to warrant the exercise of this Court's discretion to grant the present petition. [Petition for Certiorari in No. 435, Oct. Term, 1948, pp. 8-9.]

[10] The other three factors to which petitioner refers (Pet. Br. 31-34) call for only brief comment.

The prior bargaining by these parties about food services is further evidence that this is a matter of mutual concern of the employer and the employees and concerning which collective bargaining can be fruitful. This is not to suggest however, and the Board did not state, that the result in this case would have been any different if the parties had not previously bargained about some aspects of food services. We note further that the passage in *Chemi-*

(c) It follows *a fortiori* that there is no basis for the argument advanced by the National Automatic Merchandising Association (NAMA), that bargaining between the employer and its employees over in-plant food prices cannot be required because the decision would affect the contractor's relationship with its employees. (NAMA Br. 7.) For the same reason, *NLRB* v. *Pipefitters*, 429 U.S. 507, cited at NAMA Br. 6, has nothing to do with this case. There the Court sustained the Board's determination that a union

cal Workers, supra, 404 U.S. at 187, quoted at Pet. Br. 31, does not hold that prior history of bargaining between the parties may not be pertinent in determining whether the subject is within § 8(d); that discussion appeared in Part IV of the Court's opinion which is addressed to the question whether the bar of § 8(d) against unilateral modification applies to permissive as well as mandatory bargaining subjects.

Petitioner contends that "The record • • • lacks substantial evidence to support the Board's conclusion" that there was no "viable alternative" to the in-plant cafeteria and vending machines. (Pet. Br. 31-32.) We think that the Court of Appeals' approval of the Board's determination forecloses further review here, p. 20, n. 7, *supra*. On principle, the absence of alternatives to eating in the plant bears only on the importance which the employees attach to their demands on this subject, and would therefore be relevant only if, contrary to our basic submission, a demand pertaining to the employer-employee relationship must be significant to be within § 8(d). Of course, if eating outside the plant is not inconvenient, the employees are less likely to insist to impasse on their demands with respect to in-plant services.

We agree with Pet. Br. 34 that the food services boycott would not convert food prices into a mandatory subject of bargaining if they were otherwise outside § 8(d); but the employees' willingness to take collective action demonstrates that the problem is one which can give rise to industrial unrest and that the basic purposes of the Act are served if the parties are required to seek an accord on the problem.

violated § 8(b)(4)(B) when it struck an employer to compel him to obtain certain work in accordance with its collective agreement on the ground that there was sufficient evidence to support the Board's finding that the union's object was to affect the labor relations of other employers, rather than to preserve the bargaining employees' work opportunities. The Court reaffirmed that the test of legality under § 8(b)(4) is whether "under all the surrounding circumstances * * * the agreement * * * was tactically calculated to satisfy union objectives elsewhere". (*Id.* at 520 quoting *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612.) Here there is not a scintilla of evidence that the UAW's demand with respect to food prices is "tactically calculated to satisfy union objectives elsewhere"—*viz.*, to affect the food service contractor's labor relations.

NAMA contends further that because the food contractor in this case has invested approximately $100,000 in vending machines in petitioner's plant and that requested changes in vending service would "entail either additional or alternative investments by the food-service and vending contractor", bargaining between Ford and the union about the food service should be excluded under the analysis of the concurring opinion in *Fibreboard*. (NAMA Br. 7.) The contention is totally without merit, since that opinion was addressed to the impact of an employer's statutory duty to bargain on that employer's right to make decisions "concerning the commitment of investment capital and the basic scope of the [employer's] enterprise." (373 U.S. at 223.) It was not at all concerned with the impact of bargaining between an employer and his employees on the investments of third parties. After all, the result of *Fibreboard*, as to which the Court was unanimous, was to require bargaining about the form of subcontracting involved in that case; an

employer's decision not to subcontract can have serious adverse consequences for the subcontractor and may destroy part or all of his investment. Indeed, NAMA's argument turns the analysis of the concurring opinion in *Fibreboard* inside-out. The thrust of that opinion, if it is pertinent at all, is that a vending machine contractor is not obligated to bargain with its employees as to the financial and other terms on which it should accept or reject the vending contract proferred by Ford, not that Ford is freed from its obligation to bargain with its own employees. Of course, a change in terms of the vending contract may affect the contractors ability to operate "profitably" (NAMA Br. p. 7) but there is nothing in the NLRA or in the "risk-capital free enterprise system" (*id.*) as we understand it, that assures entrepreneurs the right to operate "profitably".[11]

Finally NAMA advances an analogy between this case and *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 where it was said that Jewel was not required to bargain with its meat cutter employees regarding a "schedule of prices at which its meat would have to be sold". That opinion would be in point if this case involved a demand by the UAW that petitioner bargain with it concerning the price at which it sold automobiles or its other products *to the general public*. But the question here is whether the employer's duty to bargain encompasses the price which its employees will have to pay for food consumed during the lunch hour in the plant cafeteria and in vending machines on the plant's premises. That is not an entrepreneurial decision by Ford, such as the pricing of automobiles to its dealers and the

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[11] Even a regulated industry has no guarantee of profits, as this Court again observed in *FERC* v. *Pennzoil Producing Co.*, No. 77-648, Sl. Op. p. 10 (January 16, 1979).

public. Ford provides the cafeteria and makes the vending machines available as part of its labor relations policy. The formulation and implementation of that policy was withdrawn by the NLRA from Ford's unilateral control when its employees exercised their statutory right to bargain through a representative of their own choosing. A more pertinent analogy to the present case than *Jewel Tea* would be presented if a meat cutter's union sought to obtain as part of the employees' compensation a discount on meat purchases *by employees.*[12]

CONCLUSION

For the above stated reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[12] Compare *N.L.R.B.* v. *Central Illinois Public Service Co.*, 324 F.2d 916, 918-919, (C.A. 7) (gas discount, annually worth an average of $48 to each of the employees, held to be a mandatory bargaining subject).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF ON BEHALF OF THE NATIONAL AUTOMATIC MERCHANDISING ASSOCIATION, AS AMICUS CURIAE.

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I. INTEREST OF THE AMICUS CURIAE.*

The National Automatic Merchandising Association ("NAMA") is the national trade association of the merchandise

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(2), these consents are being filed simultaneously with the Clerk of the Court.

vending and food service management industry. Its membership consists of nearly 2,000 vending and food service companies (including ARA Services, Inc., the foodservice and vending contractor at petitioner's plant) as well as over 350 vending machine manufacturers and suppliers of vendible products and component parts. Also, affiliated with NAMA are 28 state and regional councils serving this industry in their respective localities.

NAMA was founded in 1936 to assist its members in a wide spectrum of matters and regularly represents their interests before the courts, the legislatures, and the executive and administrative branches of government. Such representation constitutes a significant aspect of NAMA's activities. It is, therefore, in accordance with that role that NAMA addresses this Court in the instant case.

The questions presented in this case are of vital concern to NAMA and its members; the issue in this litigation—whether in-plant food services and prices, as provided by an independent contractor, are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act and, accordingly, mandatory subjects of bargaining—raises a recurrent[1] and substantial problem. This industry is, in large part, dependent upon sales to employees in their workplace[2] and, as a result, compulsory bargaining between employers and their employees to control that business would manifestly have a major effect on the continued vitality of this industry. Further,

1. Prior to this case, this issue has arisen in four other cases: *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), enf. den. 387 F. 2d 542 (4th Cir. 1967) (en banc); *McCall Corporation*, 172 NLRB 540 (1968), enf. den. 432 F. 2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268, enf. den. 457 F. 2d 936 (1st Cir. 1972); and *Ladish Co.*, 219 NLRB 354, enf. den. 538 F. 2d 1267 (7th Cir. 1976). In each of those cases, NAMA participated before the Court of Appeals as an *amicus curiae*.

2. Over 50% of the total sales for the industry are consummated in plants, factories, and offices to employees. See, "Census of The Industry—1978", VENDING TIMES, June, 1978, at 64.

the specific arrangements between petitioner and its food service contractor which are at issue in this case are not unique so that the outcome of this litigation will have broad ramifications throughout this industry. See generally, Beitel and Funk, "What You Should Know About Location Contracts Today", VEND, March 1, 1968, at 25 (discussing the basic types and contents of location agreements, including sample contracts). For these reasons, NAMA respectfully submits its view to the Court as an *amicus curiae* in support of petitioner, Ford Motor Company.

II. ARGUMENT.

A. In-Plant Food Services and Prices Are Not Terms and Conditions of Employment.

Although "[t]he phrase 'conditions of employment' is no doubt susceptible of diverse interpretation . . . [i]t is important to note that the words of the statute are words of limitation."[3] *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 220 (1964) (Stewart, J., concurring). See also, Goetz, "The Duty To Bargain About Changes In Operations", 1964 DUKE

3. Section 8(d) of the National Labor Relations Act, as amended, defines the duty to bargain collectively as "the performance of the mutual obligation . . . to meet . . . and confer in good faith with respect to *wages, hours and other terms and conditions of employment* . . ." 29 U. S. C. § 158(d) (emphasis added). Concomitantly, Section 8(a)(5) of that Act provides that it is "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." 29 U. S. C. § 158(a)(5).

In this case, the National Labor Relations Board found that petitioner Ford Motor Co. violated Section 8(a)(5), and derivatively Section 8(a)(1), by refusing to bargain with its employees certified representative, Local 588, United Automobile, Aerospace and Agriculture Implement Workers of America, over in-plant food prices and service. Pet. App., p. A24. That order, which was subsequently affirmed by the United States Court of Appeals for the Seventh Circuit (Pet. App., pp. A1 *et seq.*) was based upon the Board's conclusion from its prior decisional law that these subjects are "conditions of employment". Compare, Pet. App., p. A23 with pp. A42 and A43.

L.J. 1, 13 at n. 35 (1964) (discussing legislative history). That limitation has two dimensions. *First*, it includes "only issues which settle an aspect of the relationship between the employer and employees". *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971). *Second*, it excludes "managerial decisions which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring). The schedule of prices and service arrangements for in-plant food service and vending operations, as provided by an independent contractor, are not "conditions of employment" within the meaning of that statutory limitation. Just as a grocery store "need not have bargained about or agreed to a schedule of prices at which its meat would be sold," so too, these subjects lie outside the sphere of mandatory bargaining.[4] *Local 189, Amalgamated Meat Cutters and Butcher Workmen* v. *Jewel Tea Co.*, 381 U. S. 676, 689 (1965).

As a threshold matter, the subject of food prices and services is not, like a no-strike clause, a matter which "regulates the relations between the employer and the employees." *Borg-Warner Corp.*, 356 U. S. at 350. See also, *Pittsburgh Plate Glass Co.*, 404 U. S. at 178. Rather where, as here, in-plant food and vending services are provided by an independent contractor,[5] those issues affect principally "the employer's freedom

4. Under federal labor law, as authoritatively construed by this Court, only those subjects specifically encompassed by Section 8(d) are "within the scope of mandatory collective bargaining." *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349 (1958). "As to other matters, however, each party is free to bargain or not to bargain." *Ibid.*

5. While matters involving third parties were not intended to be wholly outside the mandatory bargaining obligation, the inclusion of such subjects is warranted only where there is a demonstrably extreme impact on present employees (*e.g.*, a threatened loss of their jobs) and where other competing considerations (*e.g.*, an adverse effect on the employer's freedom to conduct his business) are absent. *Pittsburgh Plate Glass Co.*, 404 U. S. at 178-179 and n. 19. Here, however, not only are such countervailing considerations clearly present but, equally important, the subjects at issue do not "vitally affect[s]" employees. *Id.* See, discussion *infra* at pp. 8-10.

to conduct his business" with that foodservice and vending contractor. *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19. The agreement between petitioner and ARA, the foodservice and vending operator at its plant, denied petitioner the right to unilaterally control either prices or services. Pet. App., p. A3. Petitioner is, therefore, legally incapacitated from bargaining on these subjects to effectuate any recision in prices or to compel any alteration in service *"after they are determined,"* as required by the Board's order. Pet. App., p. A25 (emphasis added). Conversely, as even the Board has admitted, "it is impracticable to require consultation with a union before each change in the price of any of the products sold." *Westinghouse Electric Corp.*, 156 NLRB 1080, 1081 (1966), enf. den. 387 F. 2d 542 (4th Cir. 1967) (en banc). Nor is there any basis for jointly subjecting the food and vending operator, in addition to the employer, to the collective bargaining process since any "[s]uch discussions would be held in a vacuum as there is no existing collective-bargaining relationship between the caterer and the union nor is there any legal basis for invoking one." *Id.* at 1089. Indeed, only termination of petitioner's contractual relationship with its food and vending contractor would allow petitioner the feedom to bargain over the subjects at issue (cf., *Ladish Co.*, 219 NLRB 354, 458 (1975), enf. den. 538 F. 2d 1267 (7th Cir. 1976)), but that alternative is neither practical[6]

6. In contrast, in-plant food and vending service that is operated and controlled exclusively by the employer, which would undeniably be more amenable to bargaining, is not at issue in this case but instead poses a discrete question. See, *Weyerhauser Timber Company*, 87 NLRB 672 (1949) and *McCall Corporation*, 172 NLRB 540 (1968), enf. den. 432 F. 2d 187 (4th Cir. 1970). To that extent moreover, prior decisions involving other "employer-operated" services are inapposite. See, e.g., *Lehigh Portland Cement Co.*, 101 NLRB 1010 (1952), enf'd. 205 F. 2d 821 (4th Cir. 1953). Those situations simply do not create the same problem of "fictional bargaining" by an employer which lacks, as petitioner does here, the total control necessary to effectuate the purposes of the Act in collective bargaining. See, *Westinghouse Electric Corp.*, 387 F. 2d 542, 550 (4th Cir. 1967) (en banc).

(Footnote continued on next page)

(*id.* at 351 (Member Kennedy, dissenting)) nor warranted by the statute. Accord, *N. L. R. B.* v. *Enterprise Association of Pipefitters, Local Union No. 638*, 429 U. S. 507 (1977).

Pricing and servicing policies, moreover, are the types of "managerial decisions which lie at the core of entrepreneural control . . . [and] should be excluded from the area" of collective bargaining. *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring). Like any other retail-oriented business, the in-plant food and vending service is essentially a merchandising operation: "[e]ach vending machine is a little like one shelf in a store." Reed, "Starting And Managing A Small Automatic Vending Business," p. 3, UNITED STATES SMALL BUSINESS ADMINISTRATION, THE STARTING AND MANAGING SERIES, Vol. 13 (G.P.O. 1967). Its prices, therefore, should stand on the same footing as those retail prices which this Court found immune from any bargaining obligation in *Local 189, Amalgamated Meat Cutters and Butcher Workmen, supra.* Similarly, service itself involves countless decisions (see, Reed, "Starting And Managing . . .", *supra*) "concerning the commitment of investment capital and the basic scope of the enterprise" and, as a result, is manifestly inappropriate for bargaining. *Fibre-*

(Footnote continued from preceding page.)

By the same token, although other types of third party-provided services (e.g., insurance and pensions) may, admittedly, be properly subjected to bargaining, the issues in this case stand on a different footing in terms of both their impact on employees and their intrusion on traditional principles of free enterprise. See, fn. 5, *supra.* Not only is in-plant food inherently less significant in impact than, for example, pensions but, equally important, its regulation through collective bargaining impinges much more substantially on the basic direction of the third party-contractor's business (e.g., capital investment and allocation of labor) than comparable control of an insurance or pension plan. See, discussion *infra.* Indeed, the Board has tacitly recognized this distinction by virtue of the scope of its proposed remedy in this case. Pet. App., p. A25. Cf., *Keystone Consolidated Industries,* 237 NLRB No. 91, 99 LRRM 1036, 1040 (1971) (where the remedy required the employer to roll-back changes in employee insurance coverage upon request of the union rather than, as in this case, merely "bargain on such price change only after they are determined" and without automatically rescinding those changes).

board Paper Products Corp., 379 U. S. 223 (Stewart, J., concurring). For example, ARA currently has approximately $100,000.00[7] invested in vending machines at petitioner's plant while petitioner has, similarly, dedicated space, utilities, maintenance, and all other cafeteria equipment. Pet. App., p. A3. Union-requested alterations in vending service (e.g., additional coffee service; more hot and less cold food, etc.), therefore, entail either additional or alternative investments by the foodservice and vending contractor. Concomitantly, any requested changes in the manual foodservice inherently affect ARA's own labor relations with its employees at petitioner's plant and/or petitioner's capital investment: faster service, for instance, may necessitate either changes in job duties, additional hiring, and/or further investment in labor-saving machinery. Both the prices charged and the types and amounts of services provided, accordingly, mainly concern the ability of the independent foodservice and vending contractor to operate profitably[8] within the con-

7. Joint Exhibit 22 lists the number and type of vending machines which ARA has placed in use at petitioner's plant. Of the 120 machines described in that exhibit, 100 fall within the descriptions contained in the UNITED STATES DEPARTMENT OF COMMERCE, CURRENT INDUSTRIAL REPORTS, "Vending Machines (Coin Operated) 1977", Document MA-35U (77-1) (issued May, 1978). That report, moreover, details the number and aggregate value by types of vending machines shipped during 1977.

With this information, an average value per unit for each type of vending machine (e.g., soft drinks, coffee and hot beverages, etc.) at petitioner's plant was calculated. This average value per unit was utilized to determine the aggregate value of each category of machines at the plant and then the total aggregate value for the 100 machines within these descriptions. That total figure was calculated at $97,000.00 and with the addition of the noncategorizable equipment (e.g., micro-wave ovens and currency changers), it is submitted that ARA's investment in such equipment at petitioner's plant exceeds $100,000.

8. As the Board has previously noted, the existence or absence of profits is "not a mandatory subject for collective bargaining". *Package Machinery Co.*, 191 NLRB 268, 269 at n. 5 (1971) enf. den. 457 F. 2d 936 (1st Cir. 1972). Nor are profits, for either petitioner or its contractor, even a proper factor in assessing a bargaining obligation. *Pittsburgh Plate Glass Co.*, 404 U. S. at 176-177, n. 17. See also, *Fibreboard Paper Products Corp.*, 379 U. S. at 223 (Stewart, J., concurring).

straints of its agreement with an employer. To subject such matters to collective bargaining "would mark a sharp departure from the traditional principles of a free enterprise economy"; a departure which, moreover, "Congress certainly did not choose when it enacted the Taft-Hartley Act." *Fibreboard Paper Products Corp.*, 379 U. S. at 226 (Stewart, J., concurring).

B. In-Plant Food Services and Prices Do Not Vitally Affect Employees' Terms and Conditions of Employment

Although matters involving third parties, such as food service and vending contractors, "are not wholly excluded" from the range of topics subject to mandatory bargaining, the inclusion of any such issue is warranted only when "it vitally affects the terms and conditions of employment."[9] *Pittsburgh Plate Glass Co.*, 404 U. S. at 179. The significance of a given topic on the terms and conditions of employment, moreover, must inherently be assessed in the context of the totality of circumstances.[10] *Ibid.* Applying that analysis in the instant case, it is ineluctably manifest that "the impact" of in-plant food services and prices "on the 'terms and conditions of employment' of active employees is hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*" and cannot be deemed to have "vitally affected" employees. *Id.* at 182.

Nothing in the Board's decision in this case establishes that this subject "vitally affects" employees' terms and conditions of

9. Yet, as this Court has cogently noted, even where such impact is conclusively demonstrated, "[o]ther considerations, such as the effect on the employer's freedom to conduct his business, may be equally important." *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19. See also, *N. L. R. B.* v. *Katz*, 369 U. S. 736, 748 (1962). That caveat is especially apropos in this case. See discussion at pp. 3-8, *supra*.

10. This standard arises implicitly in this Court's prior decisions as was acknowledge by the Court of Appeals in this case. Pet. App., pp. A8-10. It is, moreover, intuitively obvious that, without such a standard, this Court's "vitally affects" test would be substantially undermined. Cf., *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1941).

employment. Only its suggestions that reasonable alternatives to in-plant food are not viable (Pet. App., p. A23, fn. 11; Brief For The National Labor Relations Board In Opposition [To Certiorari], pp. 10-11) even deal with this criterion[11] and those questionable findings are, by its own admission, insufficient: "[t]he fact that alternative eating facilities are available is not determinative [but rather] is a factor to be considered." *McCall Corporation*, 172 NLRB at 546. Other factors which would be equally significant, such as the relationship between overall in-plant prices and market prices or the relationship between the amount of the price increases in comparison to normal inflationary increases in food prices generally,[12] were totally ignored; similarly, the alternative options of bargaining over related, but clearly mandatory, subjects[13] (e.g., wages, time available for lunch, air-

11. Other factors relied upon by the Board and the Court of Appeals are not only spurious (see, Petition for Writ of Certiorari, pp. 8-9) but also are unrelated to the impact on employees. Neither petitioner's potential for profit nor its potential for control of the food service operation affect the significance of this subject for employees. *Pittsburgh Plate Glass Co.*, 404 U. S. at 176-179, n. 17. See also, discussion *supra* at pp. 3-8. Similarly, employee interest cannot be equated with employee impact, and, in any event, would, if utilized as a factor, make any issue subject to mandatory bargaining contrary to Congressional intent. *Fibreboard Paper Products Corp.*, 379 U. S. at 221 (Stewart, J. concurring). Conclusionary labelling of this matter as part of the "physical dimension of one's working environment" (Pet. App., p. A12), moreover, only begs the true question: "whether it vitally affects the 'terms and conditions' of . . . employment." *Pittsburgh Plate Glass Co.*, 404 U. S. at 179. See, Cox and Dunlop, "Regulation Of Collective Bargaining By The National Labor Relations Board," 63 HARV. L. REV. 389, 401 (1950).

12. Here, there is no allegation, much less evidence, that the food prices were excessive or unreasonable. Thus, while bargaining might in certain cases be appropriate where no alternatives exist (but see, fn. 13 *infra*) "to protect the negotiated wage scale against possible undermining through the diminution of the [employee's] wages" due to outrageous prices (*Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 293 (1959), this is demonstrably not such a situation. "[T]his is obviously not the case of hardship . . ." *N. L. R. B.* v. *Package Machinery*, 457 F. 2d at 937.

13. Since other avenues of bargaining are readily available for many subjects, including numerous mandatory issues (e.g., higher

(Footnote continued on next page)

conditioning to alleviate spoilage in brown-bagging, cost of living adjustments geared to in-plant food prices, etc.) were equally improperly disregarded. See generally, *N. L. R. B.* v. *Package Machinery Co., supra*.

Furthermore, "equating the trifles here with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting 'conditions of employment' is sheer nonsense." *Westinghouse Electric Corp.* v. *N. L. R. B.*, 387 F. 2d at 550 (en banc). In-plant food prices and services are neither integral to the establishment of a stable wage structure nor closely related to job security.[14] *Oliver*, 358 U. S. at 292-295. Cf., fn. 12, *supra*. Indeed, any purported relationship between these subjects and employees' terms and conditions of employment is simply "too speculative" and "insubstantial" a foundation upon which to base an obligation to bargain in this case.[15] *Pittsburgh Plate Glass Co.*, 404 U. S. at 180 and 182.

(Footnote continued from preceding page.)

wages instead of pensions), the existence of alternative subjects for bargaining cannot be made the sole touchstone. Yet, at the same time, it is not inappropriate to utilize the availability of alternative channels of bargaining as a factor in the more limited determination of whether a particular subject involving a third-party so "vitally affects" employees' terms and conditions of employment as to be deemed a mandatory subject for bargaining.

14. In addition, removing these subjects from the scope of mandatory bargaining will not result in "disparaging or undermining the union" in its efforts to improve working conditions. *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 151 (7th Cir. 1951). Other less onerous and more direct bargaining routes remain available to protect any legitimate employee interests. See, fn. 13 *supra*.

15. Employees purchasing in-plant, from a practical standpoint, are not differently situated from employees consuming off-plant food. There is neither a greater impact nor any additional right to compel bargaining over the third party's food service and prices merely because it is at the workplace. Cf., *Local 189, Amalgamated Meat Cutters and Butcher Workers*, 381 U. S. at 689 and *Pittsburgh Plate Glass Co.*, 404 U. S. at 179, n. 19.

III. CONCLUSION.

For each of the foregoing reasons, as well as for the reasons set forth in petitioner's briefs, the judgment of the Court of Appeals should be reversed and the Board's order denied enforcement.

Respectfully submitted,

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